



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HDI



HL 20RY 5

120
IND.N

IND.P

Ord. Jan. 1911.



HARVARD LAW LIBRARY

Received

JAN 10 1911

1 22 68 c

THE PUNJAB LAW REPORTER,

CONTAINING

CASES DETERMINED BY THE CHIEF COURT, PUNJAB,

AND

THE FINANCIAL COMMISSIONER, PUNJAB.

EDITED AND PUBLISHED

BY

DHARM DAS SURI,

*VAKIL, HIGH COURT, NORTH-WESTERN PROVINCES,
AND PLEADER, CHIEF COURT, PUNJAB.*

Vol. IX--1908.

JANUARY—DECEMBER.

LAHORE:

PRINTED AT "THE COMMERCIAL PRINTING WORKS."

1771 3 1 1771

A T A B L E

OF THE

NAMES OF CASES REPORTED IN VOLUME IX.

—:—:—

1908.

A

	No.
Abas Ali Shah v. Sher Zaman ...	122
Abdul Gufar Khan v. Muhammad Zin-ud-din ...	96
Abdullah v. Allah Dad ...	18(F.B.)
Abdul Karim v. Sahib Jan ..	99
Abdulla Khan v. Gunda ...	71
Abdul Rahman v. Charag Din ...	129
Achhar Singh v. Mehtab Singh ...	134
Achhru v. Labhu ...	81
Aiwaz v. Simla-Kalka Railway Company ...	15
Ajndhia Pershad v. Ahsan-ulah ...	53
Allah Ditta v. Shahua ...	175
Amin Chand v. Tirath Ram ...	95
Am'n Chand v. The Crown ...	45
Amir Chand v. Durga Das... ..	198
Amir Ali v. Mussammat Baggo ...	4
Amrit Lal v. Bhagwana ...	80
Anwar Ali v. Inayat Ali ...	8
Attar Singh v. Sant Singh ...	133
Aya Ram v. Karm Narain ...	208

B

Bansi Dhar v. Ohhanga Ram ...	176
Barkat Ali v. Jhanda ...	59
Baij Nath v. Shamboo Nath ...	113
Basheshar Lal v. Bhai Natha Singh ...	102
Baru Mal v. Munir Khan ...	30
Babadur v. Alia ...	19
Balwant Singh v. Ram Das ...	141
Basant Ram v. King Emperor ...	36
Bhag Singh v. Dhirta Singh ...	142
Bhagat Ram v. Paras Ram ...	184
Bhagat Singh v. Devi Dyal ...	130

ii TABLE OF CASES REPORTED—P. L. R., 1908.

B—Concluded.

	No.
Bhagwan Das v. Hardit Singh	108
Bhagwan Kaur v. Gajindar Singh	205
Bhagwan Singh v. Mohan Lal	87
Bhola v. The Crown	46
Bishambar Das v. Udho Ram	21
Bishen Singh v. Amritsaria	103
Budh Singh v. Dewa Singh	199
Buta Singh v. Ram Singh	131
Buta Singh v. Tara Singh	49

C

Chiragh Din v. Nizam Din	65
Chuni Lal v. Mian Ghulam Farid Khan	41

D

Dalip Singh v. Ishar Singh	193
Darya Ditta v. Mana Singh	219
Devi Dyal v. Ahmad Khan	91
Dhanpat Mal v. Jhaggar Singh	164
Dial Singh v. Bakhshish Singh	24

F

Faiz Ahmad v. The Crown	140
Faiz Bakhsh v. Jahan Shah	28
Fakiria v. Lhani Nath	26
Faqir Ali Shah v. Ram Kishan	88
Faqir Muhammad v. Miran Bakhsh	188
Fatta v. Khan Bahadur	172
Fazal v. Hayat Ali	22
Fazal Dad Khan v. Sawan Singh	39
Fazal Din v. Narain Singh	119
Fateh Ali v. Nizam Din	37
Fatteh Muhammad v. Said Ahmad	3

G

Gamun v. Karim Khan	171
Gandu Singh v. Natha Singh	6
Ganga Ram v. Abdul Rahman	93
Ganga Ram v. Mussammat Dargi	125
Ganpat Rai v. Kesho Ram	181
Ghulam Muhammad v. Jangbaz	196
Ghulam Mustafa v. Shabab-ud-din Khan	63
Girdhari Das v. Gobind	85
Girdhari Ram v. Faizullah Khan	166

TABLE OF CASES REPORTED—P. L. R., 1908. iii

G.—*Concluded.*

	No.
Gokal Chand v. Rahman ...	62
Gujar v. Dula ...	178
Guldad Khan v. Gul Khan ...	82
Gulla Singh v. Sunder Singh ...	173
Gurditta v. Jai Singh ...	31
Gurditta v. Narain Das ...	169

H

Haidar Ali v. Ghulam Muhammad ...	213
Hamira v. Ram Singh ...	74
Hansraj v. Sundar Lal ...	138
Har Gopal v. Bhagwan Sahai ...	38
Hari Singh v. Nika Singh ...	66
Haria v. Kanhaya ...	64
Harji Mal v. Pokhar Das ...	117
Harya v. Mul Chand ...	89
Hazara v. Bishan Singh ...	58
Hira v. Karam Kaur ...	35
Hira Singh v. Gulab Singh ...	111
Hukam Chand v. Nikka Singh ...	97
Hussain Khan v. Hira Lal ...	189

I

Iahi Bakhsh v. The Court of Wards of the Property of Khan Bahadur Makhdum Hassan Bakhsh ...	78
Imam Bibi v. Ghulam Hussain ...	177
Indar v. Asa Singh ...	90
Ishar v. Partap Singh ...	13
Ishar Das v. The King Emperor of India ...	112
Ishwar Das v. Duni Chand ...	70
Ishri Pershad v. Besheshar Nath ...	179

J

Jafar Khan v. Raja Azimullah Khan ...	43
Jahan Khan v. Dalla Ram ...	48
Jalla v. Gehna ...	79
Jang Bahadur Khan v. Karm Khan ...	144
Jhandad Khan v. Abbas Khan ...	189
Jiwa Singh v. Khazana ...	161
Jiwani v. Bhagel Singh ...	33
Jowand Singh v. Ishar Singh ...	210

K

	No.
Kadir Bakhsh v. Aziz Muhammad ...	200
Kaka Singh v. The King Emperor ...	155
Kala Khan v. Crown ...	211
Kalu v. Parta Mal ...	202
Karam Chand v. Khuda Bakhsh ...	23
Karim Bakhsh v. Watta Mal ...	7
Kartar Singh v. Puran ...	180
Kasu v. Atar Singh ...	207 F.B.
Kebar Singh v. Mahaman Singh ...	128
Kesar Devi v. Partap Singh ...	185
Khairu v. Fakir Chand ...	150
Khagindra Nath Das v. Nanak Chand ...	218
Khuda Bakhsh v. Imam Din ...	216
Khan Zama v. Fattah Sher ...	183
Khushal Singh v. Jainmal ...	190
Kirpa Ram v. Khushali Mal ...	195
Kirpa Ram v. Hira Nand ...	215
Kishan Chand v. Tej Din ...	197

L

Lachhman Das v. The Crown ...	54
Lakha Singh v. Jota Singh ...	14

M

Maghar Singh v. The King Emperor ...	147
Mahmud v. Nur Ahmad ...	174
Mahmud Khan v. Khuda Bakhsh ...	145
Mahtab Singh v. Niaz Ali ...	38
Makhan Singh v. Ishar Singh ...	118
Mam Raj v. Gokal Chand ...	186
Mangladha v. Lal Chand ...	60
Mohar Chand v. Mussammat Lachhmi ...	73
Mian Amar Singh v. Seth Chand Mal ...	137
Miran Bakhsh v. Ghanaya ...	114
Mohan Lal v. Janki ...	163
Mohar Singh v. Jhanda ...	44
Mohkam Din v. Monsab Dar ...	16
Muhaminad Afzal Khan v. Nand Lal ...	146
Muhammadi Begum v. Faiz Muhammad Khan ...	12
Muhammad Din v. Jawahir ...	170
Muhammad Murad v. Sardar Bakhsh ...	84
Mul Chand v. Imam Bakhsh ...	160
Mul Raj v. Ladha Mal ...	17
Mula Ram v. Barhmi ...	40
Munshi v. The Crown ...	72
Mussammat Alah Jawai v. Muhammad Hassan ...	110
Mussammat Begam Bibi v. Ghulam Muhammad ...	101
Mussammat Ishri v. Wadhawa ...	152
Mussammat Jainna Devi v. Mul Raj ...	83
Mussammat Kartar Devi v. Mussammat Sarasti ...	98

TABLE OF CASES REPORTED—P. L. R., 1908. v

N

	Nc.
Naidar Mal v. Mukh Ram ...	106
Nanak Chand v. Basheshar Nath ...	94
Narpat Rai v. Devi Das ...	50
Nawab Ahsan Ullah Khan v. Nawab Muhammad Ibrahim Ali Khan ...	154
Nawab Khan v. Sewa Das...	187
Nigahin v. Sandal Khan ...	201
Nihal Chand v. Ali Bakhsh ...	25
Nihal Chand v. Bhagwan Singh ...	9
Nihal Devi v. Shib Dial ...	11
Nur Muhammad v. Mussammat Aimna ...	191

P

Pala v. Nur Muhammad ...	115
Pir Bakhsh v. Sardar Bano ...	209
Puran v. Toni ...	204
Puran v. Mamun ...	76

R

Radho v. Harnaman ...	167
Raghu Mal v. Bendu ...	1 (F.B.)
Raghu Mal v. Pat Ram ...	52
Rajji v. Lal Chand ...	116
Rajo v. Karam Bakhsh ...	92
Raj Sarup v. Hardawari ...	120
Ralla v. Amin Chand ...	126
Ram Chand v. Thakar Dass ...	29
Ram Ditta v. Takht Mal ...	67
Ram Gojal v. Teja Singh ...	121
Ram Singh v. The Crown ...	55
Ranjha v. Bulanda ...	217
Roushan v. Makhan ...	75

S

Sadhu Singh v. Secretary of State for India ...	156
Sahhai v. Ali ...	206
Sahab-ud-din v. Sohan Lal ...	168
Sahibzada v. Jowaya ...	107
Saida v. Ismail ...	82
Sandhe Khan v. Bhana ...	57
Sardar Narain Singh v. Sardar Hira Singh ...	158
Sardar Shah v. Haji ...	182
Shadi v. Mussammat Khewni ...	162

vi TABLE OF CASES REPORTED—P. L. R., 1908.

S—Concluded.

	No.
Sobha Singh v. Kishore Chand ...	203
Shah Nawaz v. Azamat Ali ...	10
Shair Singh v. Sidhu ...	100
Sham Sundar v. Sodbi Harbans Singh ...	109
Sharfo v. Ramzan ...	20
Sher Ali Shah v. Luchhman Das ...	212 F.B.
Sheo Nath v. Parma Nand... ..	151
Shib Das v. The Crown ...	77
Shib Dial v. <i>Mussammat</i> Chiragh Bibi ...	124
Shiv Nath v. The Crown ...	86
Siri Dhar v. Amar Nath ...	61
Sita Ram v. The Crown ...	139
Sobha Ram v. Ram Das ...	159
Sochet Singh v. Dial Singh ...	192
Sohna v. Sundar Singh ...	132
Sohan Singh v. Jahandad Khan ...	34
Sonun v. Rupan Bai ...	143
Sukha v. Arura Mal ...	165
Sundar v. The Crown ...	42
Sundar Das v. Dhanpat Rai ...	104
Sundar Lal v. Ram Singh... ..	5
Surta v. Fateh Chand ...	153 F.B.
Swami Dyal v. The Crown ...	149

T

Tannu Lal v. B'hari Lal ...	127
Tara Singh v. <i>Mussammat</i> Chandi ...	51
Thakar Das v. Sohawa Singh ...	123
Thakaria v. Dya Ram ...	135
Than Singh v. Tara Singh ...	69
The Crown v. Samiullah ...	148
The Crown v. Hira Singh ...	47
The King Emperor v. Mr. Sterling ...	136
The Municipal Committee of Delhi v. Devi Sahai ...	105
Topan Das v. The Secretary of State for India in Council	167

U

Umra v. Muhammad Hayat ...	194
Umra v. Ghulam ...	27

V

Vaishno Das v. <i>Mussammat</i> Deoki ...	214
Viru Mal v. Saddu ...	157

W

Walidad Alias Walya v. The Crown ...	56
--------------------------------------	----

GENERAL INDEX.

—:○:-○:-○:-

1908.

—:∞:○:∞:-

A.

ABADI : <i>See</i> PARTITION.	No. 151
———SUIT FOR POSSESSION OF UNCULTURABLE LAND OUTSIDE ABADI : <i>See</i> PUNJAB COURTS ACT (XVIII OF 1884) AS AMENDED, SECTION 70 (1), (b).	6
ACCOUNTING : <i>See</i> TRANSFER OF JUDGE.	41
ACKNOWLEDGEMENT OF PARENTAGE : <i>See</i> MUHAMMADAN LAW.	190
ACQUIESCENCE :— <i>See</i> REVISION—CIVIL CASES.	100
———DELAY IN SUING: <i>See</i> CUSTOM—ALIENATION BY SONLESS PROPRIETOR.	111
ACQUIESCENCE OF LANDLORD— <i>See</i> PUNJAB TENANCY ACT (XVI OF 1887) SECTIONS 53 AND 60.	44
ACQUITTAL : <i>See</i> REVISION—CRIMINAL CASES.	72
———APPEAL AGAINST : <i>See</i> ARMS ACT (XI OF 1878), SECTION 13.	148
———ON FACTS : <i>See</i> REVISION—CRIMINAL CASES.	15
ACT 1860—XLV : <i>See</i> PENAL CODE.	
——1863—XX : <i>See</i> RELIGIOUS ENDOWMENTS ACT.	
——1870—VII : <i>See</i> COURT FEES ACT.	
——1872—I : <i>See</i> EVIDENCE ACT.	
——1872—IV : <i>See</i> PUNJAB LAWS ACT.	
——1872—IX : <i>See</i> CONTRACT ACT.	
——1873—VIII : <i>See</i> NORTHERN INDIA CANAL AND DRAINAGE ACT.	
——1877—I : <i>See</i> SPECIFIC RELIEF ACT.	
——1877—III : <i>See</i> REGISTRATION ACT.	
——1877—XV : <i>See</i> LIMITATION ACT.	
——1878—XI : <i>See</i> ARMS ACT.	
——1882—XIV : <i>See</i> CIVIL PROCEDURE CODE.	
——1884—XVIII : <i>See</i> PUNJAB COURTS ACT.	
——1887—VII : <i>See</i> SUITS VALUATION ACT.	
——1887—IX : <i>See</i> PROVINCIAL SMALL CAUSE COURTS ACT.	
——1887—XVI : <i>See</i> PUNJAB TENANCY ACT.	

- 1887—XVII : *See* PUNJAB LAND REVENUE ACT.
- 1890—IX : *See* RAILWAYS ACT.
- 1891—XX : *See* PUNJAB MUNICIPAL ACT.
- 1893—III : *See* PUNJAB TENANCY ACT.
- 1894—I : *See* LAND ACQUISITION ACT.
- 1897—VIII : *See* REFORMATORY SCHOOLS ACT.
- 1898—V : *See* CRIMINAL PROCEDURE CODE.
- 1899—XXV : *See* PUNJAB COURTS ACT.
- 1900—I : *See* PUNJAB LAND ALIENATION ACT.
- 1900—XIII : *See* PUNJAB ALIENATION OF LAND ACT.
- 1900—III (LOCAL) : *See* PUNJAB MUNICIPAL ACT.
- 1905—II (LOCAL) : *See* PRE-EMPTION ACT.

ACT XIX OF 1841, SECTIONS 1, 3 AND 4—

*Intestate's property—Jurisdiction of Judge—Review—
Rectification of mistake by successor of Judge who
passed the order—Revision.*

Before the procedure provided by Act XIX of 1841 can be set in motion the title and *bona fides* of the applicant must be *prima facie* clear, it must be manifest that the party complained of had no lawful title to possession, and if the applicant were referred to a regular suit, he would be a serious sufferer, as by the risk of waste or misappropriation or by his inability to prosecute his rights when out of possession.

When it appeared that before issuing citation under Act XIX of 1841 the Judge did not satisfy himself that the person in possession had no lawful title and the person applying was in danger of being injured by delay, and his successor after recording evidence did not consider it right to disturb possession and passed order accordingly—

Held, that the order was not open to objection.

RAJJI v. LAL CHAND. 116

- ADMINISTRATION SUIT—MONEY-DECREE AGAINST THE ESTATE
OF A DECEASED DEBTOR : *See* CIVIL PROCEDURE CODE (ACT
XIV OF 1882), SECTIONS 213, 252, 276. 52
- ADMISSION—RIGHT ADMITTED IN SUIT. 69
- ADOPTION : *See* CIVIL PROCEDURE CODE SECTION 562. 161
- : *See* CUSTOM-ADOPTION 29, 131, 132, 133, 134 170.
- — — — — ADOPTED SON'S RIGHT TO SUCCEED COLLATERALLY
IN ADOPTIVE FATHER'S FAMILY : *See* CUSTOM-SUCCESSION. 67

GENERAL INDEX.—P. L. R., 1908.

iii

No.

ADOPTION : *See* HINDU LAW. 113

———— : *See* LIMITATION ACT, ARTICLE 118. 13

ADVERSE POSSESSION :—*See* LIMITATION ACT (XV OF 1877) SECTION 28. 163

ADVERSE POSSESSION—*Mortgagor and mortgagee—Assertion of proprietary right by mortgagee after invalid foreclosure proceedings.*

Held, that a mortgagee, who has taken fruitless foreclosure proceedings, cannot by asserting himself to be the proprietor, and getting mutation in Revenue records in his favour, start a possession adverse to the mortgagor.

INDAR V. ASA SINGH. 90

AGREEMENT TO REFER TO ARBITRATION FILED IN COURT : *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTIONS 2 AND 523. 50

AGRICULTURIST : *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTIONS 11, 57, 558 (6). 85

ALIENATION : *See* CUSTOM—ALIENATION. 14

———— : *See* CUSTOM—MUHAMMADAN LAW. 10

ALIENATION BY MALE PROPRIETOR : *See* CUSTOM—ALIENATION BY MALE PROPRIETOR.

Nos. 12, 22, 28, 35, 59, 92, 111, 115, 162, 201, 203, 210, 216

———— : *See* LIMITATION ACT, XV OF 1877, SECTION 7. 27

———— : *See* CUSTOM—HINDU LAW 9, 158

———— IN THE PRESENCE OF ADOPTED SON WHO IS MINOR : *See* CIVIL PROCEDURE CODE, SECTION 562. 161

———— : *See* REVISION-CIVIL CASES. 100

———— BY A SIKH JAT IN FAVOUR OF ISSUE FROM A MUHAMMADAN WOMAN : *See* MUHAMMADAN LAW. 190

———— BY WIDOW : *See* CUSTOM—ALIENATION BY WIDOW. 166

———— OF LAND PERTAINING TO GRAVEYARD : *See* MUHAMMADAN LAW. 78

———— OF OCCUPANCY RIGHTS : *See* PUNJAB TENANCY ACT (XVI OF 1887) SECTIONS 53 AND 60. 44

———— (mortgage) OF TRUST PROPERTY BY *Mahant* : *See* CIVIL PROCEDURE CODE, SECTION 44. 102 (F. B.)

	No.
AMENDMENT OF APPLICATION FOR PROBATE TO INCLUDE PRAYER OF LETTERS OF ADMINISTRATION NOT ALLOWED : <i>See</i> PROBATE.	73
——— PLAINT : <i>See</i> CIVIL PROCEDURE CODE (XIV OF 1882) SECTION 53.	58, 117
ANCESTRAL PROPERTY : <i>See</i> HINDU LAW.	11
——— <i>See</i> CUSTOM—HINDU LAW.	158
——— <i>See</i> CUSTOM—SUCCESSION.	156 (F. R.)
APPEAL : <i>See</i> CIVIL PROCEDURE CODE, SECTION 230.	8
——— <i>See</i> ESTOPPEL.	1 (F. B.)
——— RIGHT OF APPEAL NOT FORFEITED BY WITHDRAWAL OF PURCHASE MONEY : <i>See</i> CUSTOM—PRE-EMPTION.	104
——— VALUATION OF SUIT : <i>See</i> JURISDICTION.	129 (F.B.)
——— VALUATION : <i>See</i> PUNJAB COURTS ACT (XVIII OF 1884) AS AMENDED, SECTION 39.	215
——— AGAINST ACQUITTAL : <i>See</i> ARMS ACT (XI OF 1878) SECTION 13.	148
——— AGAINST ORDER OF REFERENCE TO ARBITRATORS : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTIONS 2 AND 523.	50
——— REFUSING APPLICATION TO FILE PRIVATE AWARD : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTIONS 520, 525, 526.	17, 184
——— FROM GOVERNOR—GENERAL'S AGENT IN BHOPAL TO THE PRIVY COUNCIL : <i>See</i> ARBITRATION.	138 (P. C.)
——— BY ONE OF THE DEFENDANTS WHEN THERE IS NO COMMON GROUND FOR ALL THE DEFENDANTS : <i>See</i> CUSTOM—MARRIAGE.	152
——— BY SOME ONLY OF THE PLAINTIFFS : <i>See</i> MUHAMMADAN LAW.	190
——— TREATED AS REVISION : <i>See</i> PUNJAB COURTS ACT (XVIII OF 1884) SECTIONS 40, 70 (a).	91
APPROVER : <i>See</i> REVISION—CRIMINAL CASES.	157
ARBITRATION : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTIONS 2 AND 523.	50
——— SECTION 521.	159
——— SECTIONS 520, 525 AND 526.—	184
——— SECTION 526.	17

GENERAL INDEX.—P. L. R., 1908.

v

No.

Arbitration—Award—Decree passed thereon—Appeal from Governor-General's Agent in Bhopal to the Privy Council—Native State.

No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision.

Quære.—Whether an appeal lies to his Majesty in Council from a decision of the Governor-General's Agent at Sehore in Bhopal?

HANS RAJ v. SUNDAR LAL AND OTHERS. 138

Arms Act (XI of 1878), Section 13—Arms—Going armed without a license—Acquittal. Appeal against—Disposal of confiscated arm.

Since the word 'arm' includes the words 'parts of arm' within the meaning of section 4 of the Arms Act a revolver clogged from disuse falls within the definition.

On conviction dangerous weapons should not be sold by auction and care should be taken in orders of the kind to avoid risk of dangerous weapons passing into improper hands.

The Chief Court set aside on appeal the acquittal of the accused of an offence under section 13 of the Arms Act.

THE CROWN v. SAMIULLAH 148

ASSIGNMENT: *See* CAUSE OF ACTION. 25

ATTACHMENT: *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 491. 30

ATTEMPT: *See* PENAL CODE (ACT XLV OF 1860) SECTIONS 443, 447, 457 AND 511. 56

AWARD: *See* ARBITRATION 138 (P. C.)

———*See* CIVIL PROCEDURE CODE, SECTION 526. 17

———APPLICATION TO FILE: *See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTIONS 520, 525 AND 526. 184

B

BENEFIT OF DOUBT: *See* PENAL CODE (ACT XLV OF 1860), SECTIONS 304, 323.

	No.
BURDEN OF PROOF: <i>See</i> CUSTOM.	64
—————: <i>See</i> CUSTOM—ADOPTION.	29, 134, 170
—————: <i>See</i> CUSTOM—HINDU LAW.	167, 181
—————: <i>See</i> CUSTOM—PRE-EMPTION.	53, 82
—————: <i>See</i> CUSTOM—SUCCESSION.	4, 67
—————: <i>See</i> MUTATION PROCEEDINGS.	200
—————: <i>See</i> PUNJAB LAWS ACT (IV OF 1872), SECTIONS 12, 15.	109
—————: <i>See</i> SPECIFIC RELIEF ACT (I OF 1877), SECTION 42.	99
—————: <i>See</i> WAKF PROPERTY.	110
—————: <i>See</i> WILL.	204

C

CANAL: <i>See</i> NORTHERN INDIA CANAL AND DRAINAGE ACT, SECTIONS 21, 22, 24, 25.	16
—————STATEMENT OF CONDITIONS OF GRANT OF LAND ON CHENAB CANAL COLONY: <i>See</i> PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 8, 59.	107
CAUSE OF ACTION: <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTION 43.	93
—————: <i>See</i> CIVIL PROCEDURE CODE, SECTION 44.	102 (F. B.)
—————: <i>See</i> RAILWAYS ACT, SECTIONS 72 AND 75 (1).	15
————— <i>Assignment—Chose in action—Right of assignee to sue when transfer is conditional.</i>	

The payee of a promissory note, which was not negotiable, mortgaged it with the plaintiff and agreed that the assignment was to continue until all moneys due to the assignee, plaintiff, remained unpaid.

Held, that the plaintiff's suit as assignee to recover the amount due on the pro-note from the maker of it was not maintainable.

NIHAL CHAND v. ALI BAKSH. 25

—————*Pre-emption—Devolution by inheritance.*

The right to sue for pre-emption upon a cause of action which has accrued to a person in his lifetime

No.

passes at his death to his successors on their inheriting his land which gave him the right to pre-empt.

FAQIR ALI SHAH *v.* RAM KISHEN. 88 (F.B.)

CHEATING : See PENAL CODE, SECTION 415. 107

Chundawand AND Pagwand : See CUSTOM—SUCCESSION. 211

CIVIL PROCEDURE CODE (Act XIV OF 1882), SECTIONS 2 AND 523—*Arbitration—Agreement to refer to arbitration filed in Court—Appeal against order of reference to arbitrators—Decree.*

When an agreement to refer a case to arbitration is filed in Court under Section 523 of the Civil Procedure Code and reference is made to arbitrators by order of Court, the order is appealable as a “decree.”

NARPAT RAI *v.* DEVI DAS. 50

SECTIONS 11, 57, 588 (6)—*Dekkan Agriculturists Relief Act XVII of 1879, as amended—“Agriculturist”—Trader owning land.*

Held, that traders who invest their profits in land and then go bankrupt are not entitled as agriculturists to the protection of the Dekkan Agriculturists Relief Act.

GIRDHARI DAS *v.* GOBIND. 85

SECTION 13—*Res-judicata—Matter directly and substantially in issue—Different causes of action—Custom—Hindu Law—Succession—Daughters—Collaterals—Sarsut Brahmans of Gopalpura village, Amristar District—Mortgage, with possession—Duty of mortgagee to keep account of rents and profits—Interest.*

A person suing for possession of land as mortgagee is not required to put forward in the suit his claim to succeed to the property as a reversioner, and his omission to do so does not prejudice his right in any way, as Section 13 of the Civil Procedure Code is not applicable to such cases.

Held, that the parties to the suit, *Sarsut Brahmans* of Gopalpura village of Amritsar District, though owned land for generations, were governed by Hindu Law and not by custom and that daughter's sons excluded near collaterals according to Hindu Law.

In a suit for redemption the Chief Court held that interests and profits realized by the mortgagee balanced each other where the mortgagee had failed to keep accounts of profits realized from the mortgaged property.

AMIN CHAND v. TIRATH RAM. 95

SECTION 13—

Res-judicata—Parties litigating under same title.

On the death of the sonless proprietor the property in suit was mutated in revenue papers in the name of the defendants. The plaintiff's claim for possession based on the allegation that he, and not the deceased, was the owner of the property was dismissed. He brought a second suit for possession on the ground that he was entitled to it as adopted son and heir of the deceased, and the suit was dismissed as barred by *res-judicata* under Section 13 of the Civil Procedure Code.

Held, that the suit was not barred.

CHIRAGH DIN v. NIZAM DIN. 65

SECTION 13—

Res-judicata—Mortgage—Redemption suits.

Held, by the Full Bench, following the principle of *stare decisis*, that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption.

DHANPAT MAL v. JHAGGAR SINGH. 164 (F.B).

SECTION 13—

Res-judicata—Plaintiff declining to proceed with suit.

Where in a previous suit the plaintiff sued *R.* for inheritance of *D.* and the defendant dying during the pendency of the suit, *A.* applied to be made and was made, a party, but on the plaintiff's statement that he did not wish to proceed against *A.* the latter was absolved from liability—

No.

Held, that a subsequent suit against A. by the same plaintiff for inheritance of D. was barred by *res-judicata*.

AMIR CHAND v. DURGA DAS. 198 AT PAGE 635

SECTION 26—
Parties—Partners. * * *

Where the plaintiff's partner claimed to be made co-plaintiff, but the latter refused to join him and the suit was dismissed—

Held, that the order of dismissal was right.

HUSSAIN KHAN v. HIRA LAL. 189 AT PAGE 611

SECTIONS 30
AND 539 : *See* MOHAMMADAN LAW.

78

SECTION 32—
Parties—Striking off of defendant after first hearing.

Held, that a Court is not competent to strike off the name of a defendant as a party to the suit after the first hearing.

FATEH ALI v. NIZAM DIN. 37

SECTION 43—
Splitting of claim—Cause of action—Principal and interest, both falling due—First suit for recovery of either of them—Subsequent suit when barred.

When under the terms of a bond both principal and interest have become due, and the plaintiff sues for recovery of either of them, his subsequent suit for the other is barred under section 43 of the Civil Procedure Code, but when after the first suit for interest a second suit for principal is filed, the latter is not barred if at the time of the first suit the principal had become due on a condition which it was optional with the creditor to enforce or not, for no one is bound to enforce a forfeiture.

GANGA RAM v. ABDUL RAHMAN. 98

SECTION 44—
Causes of action—Misjoinder of—Limitation Act (XV of 1877), Schedule II, Articles 134, 144—Religious

institution—Alienation (mortgage) of trust property by Mahant—Suit by his successor appointed by community competent to elect him against mortgagee and his tenants for possession of property mortgaged and the rent realized by mortgagee.

On the death of a *mahant* of a religious institution the plaintiff was appointed as his successor by a community competent to elect him. The plaintiff brought the present suit for possession of immovable property belonging to the institution and sought to set aside a mortgage executed by his predecessor. He alleged that defendants Nos. 1 and 2 had wrongfully taken possession of the property in dispute, and that they had obtained for themselves a certain sum of money by letting the said property to some of the other defendants, and claimed to recover the amount.

Held, that the plaintiff's claim was not bad for misjoinder of causes of action, for the relief sought was for possession of property and the mesne profits realized.

Held, also, that article 144 and not 134 of the second schedule of the Limitation Act was applicable to the claim, and the suit having been brought within 12 years from the date on which plaintiff was appointed *mahant* was not barred by limitation. In such cases cause of action arises on the date of appointment of the *mahant*.

That the word "purchased" in article 134 is not used in the technical sense of the English law, but in the ordinary dictionary sense, and the mortgagee could not be regarded as purchaser of the property.

That the plaintiff, not having succeeded to the property as heir, article 134 was not applicable on this ground also.

BASHESHA LAL v. Bhai NATHA SINGH. 102 (F. B.)

SECTION 53—

Amendment of plaint—Conversion of character of suit—Claim for injunction converted to one for possession.

No.

The amendment of the plaint by altering a claim for injunction to one for possession is not open to the objection that the character of the suit is thereby changed.

HARJI MAL v. POKHAR DAS. 117

SECTION 53—

Specific Relief Act (I of 1877) Section 42—Amendment of plaint—Declaratory suit—Plaintiff omitting to pray for further relief.

It is most desirable, whenever possible, that Courts should settle the dispute that has arisen between the parties, and, if necessary, plaint may be allowed to be amended.

When the appellate Court dismissed the claim on the ground that the plaintiff had omitted to pray for further relief, the Chief Court, on revision, set aside the order of dismissal and ordered re-trial of the appeal after allowing amendment of the plaint.

HAZARA v. BISHEN SINGH. 58

SECTIONS 102 AND 103—

Dismissal for default—Mortgage—Redemption suit—Fresh suit barred.

When a suit for redemption of a mortgage is dismissed under section 102 of the Civil Procedure Code for default in prosecution, and the order of dismissal has become final, a fresh suit for redemption is barred.

GURDITTA v. NARAIN DAS. 169

SECTIONS 103 AND 647—

Dismissal for default—Application for revision dismissed for default—Application for re-hearing—Sufficient cause—Absence of counsel owing to unusual combination of circumstances.

An application for revision by a *parda-nashin* lady was dismissed in default of appearance of both the counsel engaged by her for the case on the date fixed for the hearing. An application for re-hearing of the case was made on the ground that the counsel were prevented from appearing by an unusual combination of circumstances. It was objected that the

application did not lie, and that there was no sufficient cause for non-appearance of the party at the hearing of the case.

Held, overruling the contentions, that application lay by virtue of Sections 103 and 647 of the Civil Procedure Code and that there was sufficient cause for re-hearing of the application for revision—75 P. R., 1881, *dissented from*.

JIWANI v. BHAGEL SINGH. 33

SECTION 111—

Set-off—Court-fee when not necessary to pay on written statement.

When the defendant does not allege in his written statement that any definite and ascertained sum of money is due to him, but merely pleads that he is entitled to damages arising out of the transaction which is the basis of the plaintiffs' claim, and that if his claim to such damages is considered it will be found that plaintiffs are really entitled to nothing at all, no Court-fee is payable in respect of the written statement, *I. L. R., VIII All.*, 396; *XIII Bom.* 672; *XV Mad.* 29; *VIII W. N. Cal.* 174; 9 *Burma L. R.* 285; *I. L. R. VII All.* 284 *XV All.* 9; 6 *Bom. H. C. R.* 151 *referred to*.

BHAGAT SINGH v. DEVI DYAL. 130

SECTION 158—

See Jurisdiction.

98

SECTIONS 202,

623—*Judgment—Clerical errors—Review not necessary.*

When inadvertently wrong words are used in a judgment in describing the property in suit the corrections may be made on an application under Section 202 of the Civil Procedure Code and an application for review is not necessary to do so.

MULA RAM v. BAHMI. 40

SECTIONS 213,
252, 276—*Lis pendens—Money-decree against the estate of a deceased debtor—Claim for mere money decree not an administration suit—Mortgage by heir—Rights of decree-holder and mortgagee.*

The creditor of a deceased person obtained a decree for money payable by instalments against his assets in the hands of his son and heir, the defendant in the case. Pending the appeal by the plaintiff the defendant mortgaged the property in suit which belonged to the deceased debtor to satisfy the claim of another creditor of the deceased. The plaintiff contended that the mortgage was invalid having been made pending the disposal of his case and that he could sell the property free from the mortgage lien.

Held, that the decree obtained by the plaintiff not being a decree binding the property, and his suit not being one in the nature of an administration suit, the mortgage was not invalid and the plaintiff could sell the property only subject to the mortgage. *I. L. R.*, IV Cal., 402 distinguished. *I. L. R.*, VII All., 122; *I. L. R.*, IX Cal., 406; *I. L. R.*, XXIX Mad., 508; *I. L. R.*, XXVI All., 28 approved; *I. L. R.*, XIX All., 504, *I. L. R.*, VIII Cal., 20, 370 disapproved.

RAGHU MAL v. PAT RAM. 52

SECTIONS 223,
243—*Execution of decree—Stay of execution—Power of Court to which decree is transferred for execution.*

Held, that the Court to which a decree is transferred for execution is competent to stay execution of the decree on an application made under section 243 of the Civil Procedure Code.

Held, also, that an order refusing application to stay execution is no bar to the grant of a subsequent application made for the same purpose, if by change of circumstances interests of justice require that stay should be ordered. 8 W. R., 392, not followed. 6 N. W. P., H. C. R., 181, *I. L. R.*, VII, All. 73, X All., 389 followed.

BHAGWAN KAUR v. GAJINDAR SINGH. 205

SECTION 243,
See C. P. C. Section 223.

SECTION 230—
Execution of decree—Limitation—Decree for money.

A decree for recovery of money by sale of specific property is a decree for money within the meaning of Section 230 of the Civil Procedure Code. *I L. R., XXVIII Mad., 224, 472 followed. I. L. R., XVI All., 418, XXV All., 541 XXIV Cal., 473, XXV Cal., 580, XXVII Cal., 285 not followed.*

RAM GOPAL v. TEJA SINGH. 121

SECTION 230—
Limitation Act (XV of 1877), Schedule II, Article 179, Clause 2—Execution of decree—Joint decree—Appeal against some of the judgment-debtors in respect of the dismissed portion of claim—Starting of limitation period against other judgment-debtors.

In a suit for possession by partition a decree was passed by which plaintiffs were awarded about a fourth share in property No. 1 against defendants Nos. 1, 2, 3 and 7, and a certain share in property No. 2 against defendants Nos. 1, 2, 3, 4 and 5. The decree against defendant No. 4 was *ex parte*. When the present application of execution was made it was contended by defendant No. 4 that, so far as he was concerned, the execution was barred under Section 230 of the Civil Procedure Code and Article 179 of the second schedule of the Limitation Act, the limitation running against him from the date of the passing of the decree

For the decree-holder it was contended that as the decree was disputed by the other defendants and final decree in the case was not passed by the Chief Court more than three years previous to the application for execution, the execution was not barred, as limitation ran in case of an appeal against a decree from the date of the final decree of the Appellate Court.

Held, that the execution was not barred, for there was a single decree passed in favour of the plaintiff and not two, though all the defendants were not interested in both the properties in respect of which the decree was passed. A decree as was passed in

this case being in the nature of a joint decree could not be split into two portions, and an appeal having been filed against the decree, the date of the final decree gave the starting point of limitation.

ANWAR ALI v. INAYAT ALI. 8

SECTION 244—
Execution of decree—Restitution—Fresh suit—Plaint treated as application for execution of decree.

In execution of a decree for possession of equity of redemption by right of pre-emption, the mortgaged property was delivered to the decree-holder by mistake. The judgment-debtors had redeemed the mortgage before the decree was passed. They as mortgagees now sued the decree-holder for actual possession and were met by the plea that the suit was barred by Section 244 of the Civil Procedure Code.

Held, that the plea had no force, and that even if it were valid, the plaint could be treated as an application under Section 244 of the Civil Procedure Code for restitution of property illegally delivered to the decree-holder.

KARAM CHAND v. KHUDA BAKHS. 23

SECTION 283—
Declaratory suit—Execution of decree—Attachment—Objection against—Jurisdiction of Court—Valuation of suit—Punjab Courts Act (XVIII of 1884) Section 39.

The value for purposes of jurisdiction of a suit filed under Section 283 of the Civil Procedure Code by an objector whose claim to attached property is dismissed under Section 282 for a declaration that the property in suit belongs to him and not to the judgment-debtor who claims it as his own and is not liable to attachment and sale is the value of the property and not the amount of the decree in execution of which it is attached.

SHER ALI SHAH v. LAOHMAN DAS. 212

SECTION 295—
Punjab Courts Act (XVIII of 1884), Section 70 (1) (a)—Revision—Civil cases—Execution of decree—Rateable distribution of assets among decree-holders.

The Chief Court as a general rule of practice refuses to revise an order passed under Section 295 of the Civil Procedure Code on the ground that the order passed by the lower Court under the section may be set right by suit—66 *P. R.*, 1882 (*F. B.*); 8 *P. R.*, 1897; 15 *P. R.*, 1901; s. c. 80 *P. L. R.*, 1901; 21 *P. R.*, 1902; s. c. 179 *P. L. R.*, 1901; 76 *P. R.*, 1903; s. c. 170 *P. L. R.*, 1903; 65 *P. R.*, 1905; s. c. 130 *P. L. R.*, 1905; 82 *P. R.*, 1905; s. c. 199 *P. L. R.*, 1905, *referred to*.

FAZAL DIN *v.* NARAIN SINGH. 119

SECTIONS 311, 312 and 588 (16)—*Execution of decree—Sale—Application to set aside sale dismissed in default—Second application rejected—Order passed on second application not appealable.*

The property of a minor judgment-debtor was sold in execution of a decree. His application to set aside sale filed after it was confirmed was dismissed in default. Then he applied (a) that the dismissed application be restored; or (b) that his present application be treated as a fresh application to set aside the sale or (c) that this be treated as an application for review. The prayers were not granted and the application was dismissed. On appeal against the order dismissing the second application, the District Judge set aside the sale.

Held, that no appeal having been made against the order confirming the sale and the orders on the two applications not being appealable, the District Judge had acted without jurisdiction.

BISHAMBAR DAS *v.* UDHO RAM. 21

SECTION 312:
See CIVIL PROCEDURE CODE, SECTION 311. 21

SECTION 351, 352—*Insolvency proceedings—Schedule not framed—Suit by creditor not barred.*

Where in the insolvency proceedings no schedule was framed under section 352 of the Civil Procedure Code—

Held, that a suit by a creditor whose debt was acknowledged by the debtor in the list of debts filed by him with his application for insolvency was not barred—*I.L.R.*, *VII Mad*, 318 *followed*. 76 *P.R.*, 1899 *distinguished*.

HARYA *v.* MUL CHAND. 89

SECTION 491—

Attachment before judgment of immovable property by Small Cause Court—Claim for compensation for improper attachment—Small cause.

The Small Cause Court is prohibited not only from ordering attachment of immovable property but also from determining the question of compensation in case an attachment is ordered by mistake.

BARU MAL *v.* MUNIR KHAN. 30

SECTION 503—

Probate and Administration Act (V of 1881) Section 55—Receiver. When may be appointed.

A receiver should not be appointed to take charge of property in the hands of a defendant unless—

- (a) There is a fair probability of the suit succeeding; and
- (b) there is an allegation that the defendant is wasting or about to waste the property, or is incapable of managing it; and
- (c) there is some proof of this allegation by affidavit or otherwise.

KESAR DEVI *v.* PARTAP SINGH 185

SECTIONS 520, 525, 526—

Arbitration—Award. Application to file—Power to remit defective award—Court Fees Act (VII of 1870), Schedule II, Article 17,—Court-fee—Appeal against order refusing application to file private award—Registration Act (III of 1877), Section 17, cl. (i)—Award affecting immovable property over Rs. 100 in value signed by parties—Partition-deed.

When an application is made to court to file an award, it has no power to amend the award or remit it for the reconsideration of the arbitrators, when it is defective on the face of it, and determines matters not referred to arbitration and is so indefinite as to be incapable of execution.

Obiter. An award purporting to partition immovable property over Rs. 100 in value and signed by the parties signifying acceptance does not require registration.

Held, that a memorandum of appeal against an order rejecting an application to file an award under section 525 of the Civil Procedure Code is chargeable with a Court fee of Rs. 10 under Article 17 of second schedule of the Court Fees Act. 109 P. L. R. 1902, *dissented from*.

BHAGAT RAM v. PARAS RAM. 184

SECTION 521—
Arbitration—Misconduct of arbitrator—Hearing of case ex-parte.

The arbitrators are guilty of misconduct when they hear the case in the absence of one of the parties and decide it on evidence produced by the other party, where there is sufficient cause shown for the absence.

SOBHA RAM v. RAM DAS. 159

SECTION 526—
Arbitration—Award—Appeal against order refusing application to file private award.

Held, that an appeal lies against an order refusing an application to file a private award made under Section 526 of the Civil Procedure Code.

MUL RAJ v. LADHA MAL. 17

SECTION 539 :
See RELIGIOUS INSTITUTION. 176

SECTION 539—
Religious institution—Trust—Suit for dismissal of Mahant—Sanction of Collector necessary.

Held, that under section 539 of the Civil Procedure Code sanction of the Collector is necessary before a suit can be instituted for the removal of a *mahant* of a *dharamsala* for misconduct and misuse of endowed property. It is immaterial for applying section 539 that the person asked to be appointed in defendant's place on removal be plaintiff himself or another fit person.

DALIP SINGH v. ISHAR SINGH. 193

SECTION 562—

Remand—Preliminary point—Decision on some of the issues involved in the case.

Held, by the Full Bench, that the words "preliminary point," as used in Section 562 of the Civil Procedure Code, mean a point the decision upon which is sufficient for the disposal of the suit. 109 P.R., 1887; 89 P.R. 1891 (F.B.) *overruled*; 43 P.R. 1902; s.c. 35 P. L. R., 1902; 27 P. W. R. 1907; 120 P. R. 1906; s.c. 55 P. L. R. 1907; I. L. R., XVI Mad., 207, XX. Mad., 25; XXII Mad., 172; XXVII, All., 691; IX All., 30, foot-note, 1 Cal., W. N. 340 referred to.

ABDUL GUFAR KHAN v. MUHAMMAD ZIA-UD-DIN. 96 (F.B.)

SECTION 562—

Remand—Preliminary point—Dismissal of suit on the ground that plaintiff has no locus standi to maintain the suit—Custom—Alienation by male proprietor in the presence of adopted son who is minor—Suit by next reversioner.

Where a suit to set aside an alienation by a male-proprietor was dismissed on the ground that the alienor having an adopted son the plaintiff, next reversioner, was not competent to sue and it appeared that the adopted son was a minor—

Held, that the dismissal of the suit was wrong, for the plaintiff was competent to sue, and that order of remand of the suit under section 562 of the Civil Procedure Code is not illegal in such cases.

JIWA SINGH v. KHAZANA. 161

—————SECTIONS 562, 588 (28)—
Remand, Appeal against order of—Powers of Chief Court.

Held, that as soon as it is held by the Chief Court in an appeal against an order of remand passed under section 562 of the Civil Procedure Code by the Lower Appellate Court that the remand order appealed is not warranted by the terms of the section inasmuch as the case has not been disposed of by the Court of first instance upon a preliminary point, the Chief Court cannot enter upon, or in any way deal with, the spurious preliminary point with the Lower Appellate Court had wrongly held to justify the remand order. The appellant is not at liberty to withdraw in the Chief Court, his objection to the form of the order and obtain decisions on points of which according to his contention the Lower Appellate Court should have determined the appeal in his favor—6 P. R. 1892 followed, 1 P. R. 1903 (F.B.) S. C. 1. P. L. R. 1903 (F.B.) referred to.

IMAM BIBI v. GHULAM HUSSAIN. 177

—————SECTIONS 562 AND 595—
Remand—Privy Council. Appeal to—

Held, that no appeal lies to the Privy Council against an order of remand under Section 562 of the Civil Procedure Code, for the order is not a final decree within the meaning of Section 595 of the Code.

SOHAN SINGH v. JAHANDAD KHAN. 34

—————SECTION 588 (16):
See CIVIL PROCEDURE CODE, SECTION 311. 21

—————SECTION 595: *See*
 CIVIL PROCEDURE CODE, SECTION 562. 34

—————SECTION 647: *See*
 CIVIL PROCEDURE CODE, SECTION 103. 33

CLERICAL ERRORS—: *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTIONS 202, 623. 40

COLLATERALS' INDIVIDUAL RIGHT, *See* CUSTOM—ALIENATION BY SONLESS PROPRIETOR. 111

COMMON LAND: *See* PUNJAB TENANCY ACT (XVI OF 1887), SECTION 5 (1) (b). 180

Partition—Land used for tethering cattle.

Common land used by the co-sharers for tethering cattle is not impartible.

MAKHAN SINGH v. ISHAR SINGH. 118

COMMON LAND—SUIT FOR A DECLARATION THAT AN ORCHARD ON A PORTION OF THE VILLAGE COMMON LAND WAS PLANTED BY PLAINTIFF ALONE AT HIS OWN EXPENSE: *See* PUNJAB COURTS ACT (XVIII OF 1884) SECTIONS 40, 70, (a). 91

COMPENSATION: *See* LAND ACQUISITION ACT (I OF 1894) SECTION 31. 2

—————: *See* PUNJAB TENANCY ACT 77 (3) (d), 100. 26
See RAILWAYS ACT SECTIONS 72 AND 75 (1). 17

—————FOR BREACH OF AGREEMENT, *See* SPECIFIC RELIEF ACT (I OF 1877), SECTIONS 20, 27 (b). 97

COMPLAINT—: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898) SECTIONS 196, 537. 149

COMPOUNDING OF NON-COMPOUNDABLE OFFENCE: *See* CRIMINAL PROCEDURE CODE, SECTION 345. 47

COMPROMISE BY BROTHER ON BEHALF OF MINOR BROTHER: *See* GUARDIAN AND WARD— 191

CONFESSION: *See* EVIDENCE ACT (I OF 1872) SECTION 27. 155

CONFESSION RECORDED IN NATIVE TERRITORY: *See* CRIMINAL PROCEDURE CODE, SECTION 164. 46

CONFISCATED ARM—DISPOSAL OF. *See* ARMS ACT (XI OF 1878) SECTION 13. 148

CONTRACT ACT (IX OF 1872) SECTION 16—*Undue influence—Document executed when the executant was under arrest.*

Held, that the mortgage-deed executed by the defendant in satisfaction of a money decree while he was under arrest was not void on the ground of undue influence for the mere fact of arrest of the defendant could not be held to establish undue influence. *I.L.R. IV All.*, 352 doubted.

MUL CHAND v. IMAM BAKHSI. 160

—————SECTION 108—
Stolen property—Sale in overt market—Title—Bona fide sale.

Under section 108 of the Contract Act generally a seller of goods cannot give to the purchaser a better title than he has himself.

The real owner of an animal which had been stolen is entitled to recover it from a *bona fide* purchaser, and the buyer in overt market cannot keep the animal on the ground that he had purchased it *bona fide*.

FAIZ AHMAD v. THE CROWN. 140

SECTION 245—

Liability of retiring partner.

A partner who has retired before a certain transaction with the firm to which he had belonged takes place, cannot be held responsible unless it can be shown that the transaction was with either a previous customer or one who was aware that the retired partner had been a partner. When a person enters into a transaction with a firm without even knowing that a certain person who has already retired ever had been a partner, such person is clearly not liable to him whether he has notice of the retirement or not, unless he has actually held himself not to be a partner, a position which gives rise to a different class of consideration.

If a person is a member of a firm, and known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to make his retirement clear, he will be held responsible to them who knew of his partnership and might have been influenced by the fact. But it is definite personal knowledge which is required, not the vague impression that because a firm once belonged to a joint Hindu family all members of that family which may exist, although not personally known to the customer to exist, will for ever be liable unless they take definite steps to disabuse him of his vague impression. It cannot be held as a principle that when a person has dealings with a man who was once a member of a joint Hindu family and competent to pledge the resources of that family, such person can hold the whole of the members who once constituted a joint Hindu family responsible unless they have taken the precaution publicly to proclaim their partition.

If it be shown that the father of a minor son had notice of a fact, such minor cannot say that he had no notice.

MIAN AMAR SINGH v. SETH CHAND MAL. 137
COURT FEES ACT (VII OF 1870) SECTIONS 7 V (*e. g.*) See
Jurisdiction. 129 (F.B.)

No.

COURT FEES ACT (VII OF 1870), SECTION 7 V (e)—*Suits Valuation Act (VII of 1887); Section 3 (1) Rules under—Rule 1 (e)—Court-fee—Garden—Fruit garden.*

Held, that for purposes of Court-fee and jurisdiction a fruit garden is a "garden" even though the garden land is assessed to revenue.

SIRI DHAR v. AMAR NATH. 61

—SCHEDULE II, ARTICLE 17
—*See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTIONS 520, 525, 526.*

184

COURT-FEE—WHEN NOT NECESSARY TO PAY ON WRITTEN STATEMENT. *See CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTION 111.*

130

CRIMINAL PROCEDURE CODE ACT (V OF 1898) SECTIONS 87, 88. *See CUSTOM—SUCCESSION.* 156 (F.B.)

—SECTIONS 145
AND 489—*Revision—Criminal Cases—Dispute relating to immovable property.*

Held, that the Chief Court is competent to revise orders passed in proceedings held under section 145 of the Criminal Procedure Code, when the procedure prescribed therefor is not strictly followed.

The Chief Court set aside the proceedings in the present case, when it appeared that a copy of the initiatory order was neither served on the parties nor affixed at or near the subject of dispute, and all the parties interested in the dispute were not heard.

ABDULLA KHAN v. GUNDA. 71

—SECTION 164—
Evidence Act (I of 1872), Section 26—Confession recorded in native territory.

A confession duly recorded by a Magistrate in a native territory in proceedings under the provisions of the Code of Criminal Procedure is admissible in a trial in British India.

BHOLA v. THE CROWN. 46

—SECTION 195—
Penal Code (Act XLV of 1860), Section 182—False report to police—Sanction to prosecute—Procedure.

Before granting a sanction to prosecute, the provisions of the Criminal Procedure Code, *inter alia* section 190 *et seq.* including Section 195 must be strictly followed. A vernacular order passed by an executive officer merely bearing some more or less illegible initials directing a subordinate Magistrate to take up a case under section 182 I. P. C., is not sufficient compliance with the requirements of law.

The butchers of a town made an application to the Deputy Commissioner of the District that the Hindu shopkeepers of the place would not supply them and asked him to take measures for their relief. The Deputy Commissioner on the report of the *Tahsildar* to the effect that it was not shown that any ring or boycott had been established, without any complaint by any one and without calling the petitioners before him, issued a vernacular order for their prosecution under section 182 I. P. C.

The Chief Court on revision set aside the order as illegal.

KALA KHAN v. CROWN. 211

CRIMINAL PROCEDURE CODE ACT (V OF 1898) SECTIONS 195, 439 AND 476—*Revision—Criminal cases—Sanction to prosecute—Powers of Chief Court when order of prosecution is passed by Revenue or Civil Court.*

Held, by the Full Bench, that it is competent to the Chief Court to revise under Section 439 of the Criminal Procedure Code an order passed by any Court, Civil, Criminal or Revenue, either under Section 195 or under Section 476 of the Criminal Procedure Code.

BISHEN SINGH v. AMRITSARIA. 103

SECTIONS 196, 537
—*Penal Code (Act XLV of 1860), Section 505 (b)—Complaint—Want of Order authorising filing of complaint—Irregularity—Revision—Criminal cases—Facts.*

The accused were arrested on the 9th May and tried on the 10th and 11th May, and convicted of an offence under Section 505 (b) of the Indian Penal Code. On revision it was urged that in the absence of a complaint under Section 196 of the Criminal Procedure Code the Magistrate had no jurisdiction to try

the accused, and Section 537 of the Criminal Procedure Code is not applicable to such cases. There was a letter on the record from the Commissioner of the Division authorizing the prosecution of the accused with reference to Section 196 of the Criminal Procedure Code as sanctioned by His Honour the Lieutenant-Governor under Section 505 of the Indian Penal Code.

Held, that even if the letter did not amount in itself to a complaint but merely authorising one, the defect of procedure was cured by Section 537 (a) of the Criminal Procedure Code.

In dealing with an application for revision on facts the correct principle is to refuse interference when there is evidence on the record which is adequate and which, if believed, justifies the conviction. When two Courts have agreed on the facts the mere fact that a Single or Division Bench of the Chief Court might have come, or would have come, to a different decision on the facts would not, except in the rarest cases, justify interference by the Court.

SWAMI DYAL v. THE CROWN. 149

CRIMINAL PROCEDURE CODE (ACT V OF 1898) SECTION 198—*Penal Code (Act XLV of 1860), Section 500—Defamation—Termination of prosecution on death of complainant.*

The death of the complainant during the course of criminal proceedings for defamation has the effect of terminating those proceedings. *I. L. R. XXXI Cal. 993 (F. B.) referred to.*

ISHAR DAS v. THE KING EMPEROR OF INDIA. 112

SECTIONS 202,
204, 439. *See* REVISION—CRIMINAL CASES.

SHIV NATH v. THE CROWN. 86

SECTION 257—*Cross-examination of prosecution witnesses—Right of accused.*

It is the duty of the Magistrate to re-summon for cross-examination, after charge is framed against the accused, all or any of the prosecution witnesses that he may demand, and he cannot be called upon to pay expenses of the witnesses.

AMIN CHAND v. THE CROWN. 45

CRIMINAL PROCEDURE CODE (ACT V OF 1898) SECTION 345—
*Penal Code (Act XLV of 1860), Section 147—Compound-
 ing of non-compoundable offence.*

A Magistrate is not competent to acquit the accused by allowing a non-compoundable offence to be compounded by the parties. The magistrate must observe the procedure prescribed for trial of such offences, and is not at liberty without recording evidence to express an opinion that the offence committed is probably not the one with which the accused is charged.

THE CROWN v. HIRA SINGH. 47

SECTIONS 367, 424—
*Judgment of Criminal Court on appeal. Contents of—
 Reformatory Schools Act (VIII of 1897) Section 16.*

Section 16 of Act VIII of 1897 does not relieve an Appellate Court of the duty of seeing whether a conviction or sentence is legally maintainable.

Held, that the judgment of the Appellate Court in the following words did not comply with the requirements of sections 367 and 424 of the Criminal Procedure Code.

"I find no reason to interfere and no ground of appeal requires particular notice. This appeal is dismissed."

RAM SINGH v. THE CROWN. 55

SECTION 454—
*European British subject—Jury, trial by—Waiver of
 privilege—Revocability of waiver.*

Where an European British subject waived his right to be tried by a jury, but before any action was taken he withdrew the waiver and claimed to be tried by a jury—

Held, that the accused could withdraw the waiver of his right, and his claim should be granted as he acted promptly before any action was taken after his waiver.

THE KING EMPEROR v. MR. STERLING. 136

CROSS-EXAMINATION OF PROSECUTION WITNESSES : *See* CRIMINAL
 PROCEDURE CODE, SECTION 257.

45

CULPABLE HOMICIDE—*See* PENAL CODE (ACT XLV OF 1860)
SECTION 304. 77

Custom—Adoption—Daughter's son—Hindu Nandan Jats of Dasuha tahsil in Hoshiarpur District—Burden of proof—Riwaj-i-Am. Effect of entry in—

Held, that plaintiffs, on whom the *onus* lay, had failed to prove that among Hindu Nandan Jats of Dasuha of tahsil Hoshiarpur District, to which *got* the parties belonged, that the adoption of a daughter's son was invalid by custom.

The *Riwaj-i-Am* of the district showed that among Jats adoption of daughter's son was not invalid, and no instance was forthcoming in this *got* one way or the other.

Held, that notwithstanding the general custom of the Province the *onus* to prove invalidity of the adoption lay on the plaintiffs.

ACHHAR SINGH v. MEHTAB SINGH. 134

—————Dhillon Jats of
Amritsar District.

Held, that among Dhillon Jats of Amritsar district, the custom of adoption of a daughter's son prevails and is not invalid.

BUTA SINGH v. RAM SINGH. 131

—————Dhillon Jats of
Mauza Jawinda Khurd, Tahsil Tarn Taran, District
Amritsar.

Held, that among Dhillon Jats of Mauza Jawinda Khurd, Tahsil Tarn Taran, District Amritsar, the custom of adoption of a daughter's son prevails and is not invalid.

SOHNA v. SUNDAR SINGH. 132

—————Sekhu Jats of
Daska Tahsil, Sialkote District—Burden of proof.

Held, that the defendant, on whom the *onus* lay, had failed to prove that among Sekhu Jats of Daska Tahsil, Sialkote District, to which tribe the parties belonged, adoption of a daughter's son by a sonless proprietor was valid by custom in the presence of near collaterals.

MUHAMMAD DIN v. JAWAHIR. 170

Custom—Adoption—Sister's son—Kalals of Butari village in Ludhiana Tahsil.

Held, that the custom of adoption of a sister's son prevails among Kalals of Butari village in Ludhiana Tahsil.

ATTAR SINGH v. SANT SINGH. 133

————— *Wife's brother's son—Brahmins of Dialpur village, Kasur Tahsil, Lahore District—Right of collaterals in eighth degree to contest—Burden of proof.*

Held, that the Brahmins of Dialpur village, Kasur Tahsil, Lahore District, are governed by agricultural custom and not by Hindu Law.

Held, also that it was not proved that adoption of wife's brother's son was valid by custom among them.

Held, further, that collaterals in the eighth degree were competent to contest such adoption.

RAM CHAND v. THAKAR DAS. 29

——— *—Alienation—Estoppel—Acquiescence by father of reversioner—Son bound by father's acquiescence.*

The father of the present plaintiff expressed his willingness at mutation proceedings to take property alienated by a sonless proprietor for the sum paid by the alienee, but took no proceedings against the alienee.

Held, that the plaintiff's father must be deemed to have acquiesced in the alienation, and the plaintiff was thereby debarred from objecting to it.

LAKHA SINGH v. JOTA SINGH. 14

—————: *See* LIMITATION ACT (XV OF 1877), SECTION 7. 27

—————: *See* CIVIL PROCEDURE CODE, SECTION 562. 161

————— *—by childless male proprietor. Acquiescence by father of plaintiff.*

A childless male proprietor sold his ancestral property by two sales in 1897 and 1900. The plaintiff, his nephew, sued to set aside the sale in 1903. It appeared that the plaintiff's father took no steps to challenge the validity of the sale and he did not die till about a year after the second sale.

Held, that the suit must be dismissed, for the plaintiff must be held bound by the acquiescence of his father.

MUHAMMADI BEGAM v. FAIZ MUHAMMAD KHAN. 12

Custom Alienation by childless male proprietor. Daughters—Remote collaterals—Rattal Jats of Jallo village, Lahore District.

Held, that according to custom prevailing among *Rattal Jats* of Jallo village, Lahore District, collaterals related in the eighth degree to a sonless proprietor were not entitled to object to an alienation of ancestral land made by the proprietor in favour of his daughters.

RAJO v. KARAM BAKHSH. 92

Gift to daughter's son and son's daughter—Arains of Nakodar Tahsil.

Held, that by custom prevailing among *Arains* of the *Nakodar Tahsil* of Jullundur District, a gift of ancestral property by a sonless proprietor in favour of his daughter is valid.

PALA v. NUR MUHAMMAD. 115

Gift in favour of some of grand-nephews in the presence of nephews and other grand-nephews—Mair Rajputs of Chakwal Tahsil.

Held, that among *Mair Rajputs* of the *Chakwal Tahsil* of the *Jhelum District* a childless proprietor is competent to transfer by gift the whole of his estate in favour of some of his grand-nephews in the presence of nephews and other grand-nephews.

FAIZ BAKHSH v. JAHAN SHAH. 28

Gift to daughter—Bhatti Rajputs of Kharal Kalan village in Jullundur district and Kharal Khurd in Hoshiarpur district.

Held, that among *Bhatti Rajputs* of *Kharal Kalan* and *Kharal Khurd* villages in *Jullundur* and *Hoshiarpur* districts a sonless proprietor is not competent to make a gift of ancestral property in favour of his daughter in the presence of collaterals of the fifth and third degrees respectively.

NIGAHIA v. SANDAL KHAN. 201

*Custom Alienation by childless male proprietor. Gift—
Khana-damad—Daughter's son—Khinger Jats of
Chakwal Tahsil, of Jhelum District.*

*Held, that among Khinger Jats of Chakwal Tahsil,
of Jhelum District, a sonless male proprietor is com-
petent by custom to make gifts of ancestral property
in favour of his *khanadamad* and daughter's son and
his near collaterals have no right to object.*

FAZAL v. HYAT ALI. 22

*Gift to daughter—Consent
of son—Objection by reversioners—Arains of Jagraon
tahsil, Ludhiana District.*

*Held, that among Arains of Jagraon tahsil of the
Ludhiana District a male-proprietor's gift of ancestral
land in favour of his daughter with the consent of his
son cannot be contested by his reversioners.*

SHADI v. Mussammatt KHEWNI. 162

*Gift to stranger—
Reversioner to lineal heirs of donor—Awans of
Jullundur District.*

*Held, that by custom Awans in the Jullundur
District have no absolute and uncontrolled right to
give away ancestral land to strangers and non-re-
lations to the prejudice of their collateral relations,
and the ordinary principle of reversion of the gifted
land to the donor's line on failure of the donee's lineal
heirs is applicable to them.*

BARKAT ALI v. JHANDA. 59

Necessity—Duty of vendee.

*It is not enough for the vendee that he pays
consideration for an alienation of ancestral land by a
sonless proprietor in the presence of the Sub-Registrar.
He is bound to enquire that the amount is required
by the vendor for a necessary purpose. The mere
statement of the vendor that money is required for
purchase of other land as an act of good management
does not relieve the vendee of his duty to make the
necessary enquiry.*

JOWAND SINGH v. ISHAR SINGH. 210

*Necessity—Speculative
litigation—Punjab Courts Act (XVIII of 1884), Section*

70 (1) (b) (iii)—*Revision—Civil cases—Chief Court not competent to revise points in regard to which application for revision has not been admitted as appeal.*

Money raised for speculative litigation cannot be held to be borrowed for legal necessity, and does not justify alienation of ancestral property.

When an application under section 70 (1), (b), of the Punjab Courts Act is admitted in regard to a particular question of law, the Chief Court cannot treat other questions involved in the case open for revision and revise the same.

SOBHA SINGH v. KISHORE CHAND. 203

Custom Alienation by sonless proprietor in favour of collaterals—Right of collaterals in the ninth degree to object—Res judicata—Necessity—Delay in suing—Collateral's individual right.

Held, that in the districts in the Central Punjab, collaterals of a sonless proprietor so far removed as in the ninth degree are competent to contest validity of alienations made by the proprietor in favour of nearer collaterals or strangers.

Held, also, that in case of long delay in filing suits to contest alienations as made without necessity, though the acts of the alienors should not be narrowly scrutinized, yet when there is no indication that there was necessity for any of the alienations, the objections must be allowed and the alienations held invalid.

Held, further, that a judgment in a previous declaratory suit to set aside an alienation dismissing the claim on the ground that the plaintiffs were too remotely related to the alienor to sue, operates as a bar to the hearing of a subsequent suit attacking the alienation, if the Court in which the previous suit was filed was competent to hear the subsequent suit, and that the judgment does not operate as a bar against collaterals who did not join the plaintiff in their previous suit.

Held, also, that collaterals claim property in their individual rights and are not entitled to possession of property which descends to other collaterals equally with them.

HIRA SINGH v. GULAB SINGH. 111

Custom Alienation by sonless proprietor. Kashmiris of Panjorian village in the Gujrat District.

Held, that the parties to the case, Kashmiris of Panjorian village in the Gujrat District, though living largely on agriculture, were not shown to have been governed by agricultural custom, and Muhammadan Law was therefore applicable to the case.

KHUDA BAKHSI v. IMAM DIN. 216

Right of remote collaterals to object—Hindu Bhat Jats of Raya Tahsil of Sialkote District.

Held, that among Hindu Bhat of Raya Tahsil of Sialkote District, collaterals in the eighth degree are not entitled to contest an alienation of ancestral property made by a sonless proprietor.

HIRA v. KARAM KAUR. 35

Alienation by widow—Right of remote collaterals to object in the presence of near collaterals and daughters of alienor—Calculation of degree of relationship.

The plaintiffs, collaterals, in the sixth degree of a sonless proprietor, sued to contest an alienation of ancestral property made by his widow. The defendant pleaded that in the presence of near collaterals, some of whom had consented to the alienation, and daughters of the proprietor, who did not object to the alienation, the suit did not lie. According to custom collaterals up to and including the fifth degree excluded daughters inheriting ancestral property of their father. It appeared that some of the near collaterals had not assented to the alienation and that the daughters were not likely to object.

Held, that the plea had no force.

Found, that according to custom of the Bannu District, the mode of computation of degrees of relationship of the collaterals was from the collateral to the common ancestor, both being counted.

GIRDHARI RAM v. FAIZULLAH KHAN. 166

HINDU LAW *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTION 13.

95

Custom—Hindu Law—Alienation by male proprietor—Will—Jhiwars of Jugatpur Bazaz, Amritsar District—Evidence—Wajib-ul-arz—Attestation of, by non-agriculturist leading men in village—Ancestral property.

Held, that the family of the parties belonging to Jhiwar caste and holding land which they did not cultivate themselves were not shown to be governed by agricultural custom and were therefore subject to their personal law.

That from the mere fact of a non-agriculturist person who is a leading man in the village attesting a *Wajib-ul-arz* of the village it does not follow that he meant to acknowledge that his own particular family followed the same custom as other families in the village.

Quære,—Whether land purchased by a father for the benefit and in the name of his son is ancestral land in the hands of his son? *Chatterji* and *Chevis JJ.* held different views on the point.

SARDAR NARAIN SINGH v. SARDAR HIRA SINGH. 158

Onus
Bedi Khatri of Kalewal village, of Dasuha Tahsil, of Hoshiarpur District.

Held, that it was not shown that *Bedi Khatri* of Kalewal village of Dasuha Tahsil, of Hoshiarpur District, were bound by agricultural custom and that therefore, a reversioner of a sonless proprietor was not competent to contest the validity of an alienation made by the proprietor.

The test as regards presumption of applicability of custom in such cases is, whether a body of *Bedis* have adopted agriculture for some generations past as their mode of earning a livelihood. If they have, the presumption is that they follow agricultural custom; if not, that they follow Hindu Law, the burden of proof of a special custom being on him who asserts it.

NIHAL CHAND v. BHAGWAN SINGH. 9

Marriage of a Rajput with a Mahajan woman.

Without laying down any general rule to the effect that a marriage between a Punjabi of the *Kshatria* caste and a woman of a lower caste is always valid,

it was held that in this particular case the marriage of a *Rajput* with a *Mahajan* woman in *chadar andazi* form was a lawful one, even supposing for the sake of argument that the woman was of *Vaisya* caste.

KHAIRU v. FAKIR CHAND. 153

Custom—Hindu Law—Marriage of a Rajput with a Khatrani, validity of—Burden of proof—Evidence of marriage—Treatment as wife—Bhadiar Rajputs of Kangra District.

Held, that under Hindu Law, the marriage of a *Rajput* with a *Khatrani* woman is not invalid and that the defendants, on whom the *onus* lay, had failed to establish any custom to the contrary among *Bhadiar Rajputs* of Kangra District—

Where it was alleged that the marriage in dispute took place more than fifty years ago, and it was shown that the woman was recognised as married wife and her son as legitimate issue by the alleged husband.

Held, that under the circumstances of the case the marriage must be held as proved.

HARIA v. KANHAYA. 64

——— *Succession—Daughter—Brother—Burden of proof—Aroras of Amritsar City.*

Where a person sets up a custom governing high caste Hindus contrary to Hindu Law, the *onus* lies on him heavily to prove the custom.

Held, that *Aroras* of Amritsar who were high caste Hindus were governed by Hindu Law, and a custom at variance with Hindu Law in favour of collaterals and against the right of daughter to succeed was not shown to exist by the party setting up the custom.

RADHO v. HARNAMAN. 167

——— *Daughter—Daughter's son—Collaterals—Sarsut Brahmans of Gurdaspur City.*

Held, that the plaintiffs, on whom the *onus* lay, had proved that in matters of succession, the parties to the suit, *Sarsut Brahmans* of Gurdaspur City, were governed by custom and not by Hindu Law, and that according to custom, near collaterals of a deceased person exclude daughters and their sons from inheriting the property of the deceased.

NANAK CHAND v. BASHESHAH NATH. 94

Custom—Hindu Law—Khatris of Satgara town, Montgomery district—Burden of proof—Wajib-ul-arz—Riwaj-i-am—Entries in—

Held, that the parties to the suit, high caste non-agriculturist Khatris of Satgara town in Montgomery district were in matters of succession bound by Hindu Law and not by custom, and that the fact of record of custom in the *Wajib-ul-arz* of the village and the *Riwaj-i-am* was not sufficient to apply custom to the present case.

Held, also, that the case was not affected by the admission of applicability of custom made by one of the female parties to the case on a previous occasion.

GANPAT RAI v. KESHO RAM. 181

———*Marriage—Restitution of conjugal rights—Divorce—Repudiation of wife—Transfer of wife by deed—Wife denying right of husband and transferee to conjugal rights—Declaratory suit—Appeal by one of the defendants when there is no common ground for all the defendants.*

A wife sued for a declaration that neither her husband *W* nor the defendant *K*, in whose favour he had executed a deed transferring her, had conjugal rights against her. The suit was decreed. On the appeal of *W* the suit was dismissed against both *W* and *K*. On further appeal.

Held, (i) that a suit of this nature was not unmaintainable.

(ii) That the question in such cases is, whether there has in fact been such a repudiation of the wife by the husband as amounts to a divorce, and that without deciding that the husband would be entitled to recover possession of the plaintiff the mere execution of the deed in the circumstances of the case was not such as entitled the plaintiff to the declaration sought for against him.

(iii) That on the appeal of *W* the claim against *K* could not be dismissed

MUSSAMMAT ISHRI v. WADHAWA. 152

———*Muhammadian Law—Alienation—Sale by sonless proprietor—Gilani Sayads of Masania village, Batala Tahsil, of Gurdaspur District—Necessity—Aqqa ceremony of deceased son.*

Held, that *Gilani Sayads* of Masania village of Batala *Tahsil*, of Gurdaspur District, were governed by custom restraining alienation of ancestral land by a proprietor in the absence of valid necessity.

Held, further, that money borrowed by a proprietor for performing *aqiqah* ceremony of his deceased son must be held to have been done for a valid necessity.

SHAH NAWAZ v. AZMAT ALI. 10

Custom—Muhammadan Law—Family custom—Succession—Primogeniture—Kunjpura estate—Property appertaining to State before 1849 when the State ceased to exist as semi-independent State and property acquired since—Maintenance.

Held, that by family custom the eldest son succeeded to all the property of the Khunjpura State which appertained to it before it ceased to exist as a semi-independent State in 1849 and the other members of the family were not entitled to claim any share by partition therein but could claim maintenance only.

Held, also, that Muhammadan Law governed the succession of property acquired since the State ceased to exist as a semi-independent state.

NAWAB AHSANULLAH KHAN v. NAWAB MUHAMMAD
IBRAHIM ALI KHAN. 154

————— *Succession—Daughter—Laghari*
Bilochis of Sanghar tahsil, Dera Ghazi Khan District.

Held, that the plaintiffs, on whom the burden of proof lay, having failed to prove custom excluding daughters from inheriting property left by their father among *Laghari Bilochis* of Langhar *tahsil*, Dera Ghazi Khan District, to which tribe the parties belonged, the Muhammadan Law governed succession under which daughters are entitled to share inheritance.

SABHAI v. ALI. 206

————— *Succession—Dower—Succession to the unpaid dower of a deceased female.*

Held, that the parties were governed by Muhammadan Law in matters of succession to the unpaid dower of a deceased female, even if it were shown that they were governed by Customary Law in matters of succession generally.

FAKIR MUHAMMAD v. MIRAN BAKHSH. 188

CUSTOM—PRE-EMPTION : <i>See</i> PUNJAB LAWS ACT (IV OF 1872) SECTION 11.	No. 70
———PRE-EMPTION : <i>See</i> PUNJAB PRE-EMPTION ACT (II OF 1905), SECTION 12.	195
———PRE-EMPTION—: <i>See</i> PUNJAB PRE-EMPTION ACT (II OF 1905), SECTION 14.	183
——— <i>Pre-emption—Burden of proof—Wajib-ul-arz Chakwar. Entries in—Pindigheb Tahsil, Rawalpindi District—Bhaya chara village—Conflict between earlier and later Wajib-ul-arzes.</i>	

Held, that under section 44 of the Punjab Land Revenue Act, there is no presumption as to correctness of the entries as to pre-emption made in the *Wajib-ul-arz, Chakwar*, of Pindigheb Tahsil of Rawalpindi District, for it is no part of the record-of-rights. That even if such a *Wajib-ul-arz* be taken to form part of a record-of-rights, the circumstances that it states custom of pre-emption as tribal, whereas pre-emption is peculiarly a local custom deprives the entry of nearly all its presumptive value.

Held, also, that the value of a *Wajib-ul-arz* favouring relatives in the matter of pre-emption which stands unsupported by actual proof of custom and is followed by a later *Wajib-ul-arz*, in which the 'law' of Act IV of 1872 is stated to contain the rule of pre-emption, is reduced to nothing, even if there are negative indications the other way.

GULDAD KHAN v. GUL KHAN. 82

——— <i>Pre-emption—Houses—Vicinage—House situated on the opposite side—Katra Kanhayan of Amritsar City.</i>	
---	--

Held, that where a pre-emptor's house is separated from the house sold by a road or lane, there even if the custom of pre-emption prevails in the *mohalla* or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove, by instances in the usual way, that he has such a right.

Held, also, that the plaintiff had failed to prove such a right in respect of a sale of a house in *Katra Kanhayan of Amritsar City*, where a custom of pre-emption on the ground of vicinage was found to prevail.

MAHTAB SINGH v. NIAZ ALI. 68

Custom—Pre-emption—Houses—Katra Ahluwalia of Amritsar City—Shops—Conversion of portion of residential house into a godown.

Held, that a custom of pre-emption in respect of sales of houses was proved to exist in *Katra Ahluwalia* of Amritsar City.

Held, also, that the conversion of a part of a residential house into godowns does not alter the nature of property so as to make the custom of pre-emption inapplicable on the sale of the property.

DIAL SINGH v. BAKHSHISH SINGH. 24

— — — *Pre-emption—Houses—Kucha Gulzari Shah of Lahore City—Purchase money. Withdrawal of, by vendee—Right of appeal not forfeited thereby—Punjab Courts Act (XVIII of 1884), Section 70 (1) (b)—Revision—Civil cases—Findings of fact—Question whether ostensible mortgage is in reality a mortgage.*

Held, that a custom of pre-emption in respect of sale of houses was proved to exist in *Kucha Gulzari Shah* of Lahore City, which is a well recognised subdivision of Lahore City.

A vendee does not forfeit his right of appeal against a decree based on right of pre-emption passed against him by merely withdrawing from Court the purchase money deposited in Court by the pre-emptor.

It is not open to an appellant to question findings of fact arrived at by the lower appellate Court, when his appeal is heard under section 70 (1) (b) of the Punjab Courts Act.

Whether an ostensible mortgage is really a mortgage or a sale is a question of fact.

SUNDAR DAS v. DEANPAT RAI. 104

— — — *Pre-emption—Houses—Mohalla Karor Khan of Jullundur city.*

Held, that the plaintiff had failed to prove that the custom of pre-emption in respect of houses existed in *Mohalla Karor Khan* of Jullundur city.

HAIDAR ALI v. GHULAM MUHAMMAD. 213

Custom—Pre-emption—Houses—Mohalla Parachian otherwise called Mohalla Matta or Waris Khan of Rawalpindi city—Evidence—Right admitted in suits.

Held, that the custom of pre-emption in respect of sales of houses was proved to exist in *Mohalla Parachian* otherwise called *Mohalla Matta* or *Waris Khan* of Rawalpindi city.

Judgments in suits for pre-emption passed on the admissions of vendees are relevant when custom of pre-emption is in question.

THAN SINGH v. TARA SINGH. 69

—*Pre-emption—Houses—Mohalla Wadharian of Sialkote City—Improvements—Liability of pre-emptor.*

Held, that the custom of pre-emption in respect of sales of houses was found to exist in *Mohalla Wadharian* of Sialkote City.

The right of the vendee to recover from the pre-emptor his outlay in improvements depends upon a rule of equity, the application of which varies with the facts of each case, on which it is brought to bear. Strictly speaking the vendee is not entitled to be reimbursed for improvements which were not made in good faith. Where no claim is made for a long time, there may be an equity against compelling the vendee, not to improve his property on the mere chance of a claim for pre-emption being made; but where notice of claim is given without loss of time, followed by a suit in Court in which injunction is obtained against the vendee to stop the building, the vendee would not be entitled to recover the market-value of his improvements, and at best be allowed to remove them when it could be done without injuring the property. There is, however, another rule of equity under which any benefit that will accrue to the plaintiff from defendant's expenditure should be paid for by the former: provided, of course, that the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them.

BUTA SINGH v. TARA SINGH. 49

Custom—Pre-emption—Houses—Vicinage—Kucha Pati Ram of Dehli City.

Held, that pre-emption in respect of sales of houses by reason of vicinage prevailed in *Kucha Pati Ram* of Dehli City.

A member of a joint Hindu family having as such a share in a house is entitled to claim right of pre-emption by reason of his being owner of the share.

ISHRI PERSHAD v. BASHESHA NATH. 179

—————*Pre-emption—Market price—Good faith—Burden of proof.*

Held, that before a Court proceeds to assess market value in a pre-emption case and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith.

When the consideration for a sale was an old debt, most of which was interest and the land sold was not the vendor's only assets and he did not appear to be insolvent and it was not intended by the sale to wipe of all vendor's liabilities to the vendee—

Held, that under the circumstances there was no bad faith in the matter and the pre-emptor must pay the full consideration for the sale to the vendee to get possession of the land sold.

AJUDHIA PERSHAD v. AHSAN ULLAH. 53

—————*Pre-emption—Pre-emptor having right equal to some of the vendees and superior to others.*

The plaintiffs had equal right of pre-emption with some of the vendees and superior to the others. The shares of the vendees were specified in the sale-deed.

Held, that the plaintiffs were entitled to take the whole bargain, for the sale was one and indivisible. *I. L. R., XIX All, 148 dissented from.*

ACHHBU v. LABHU. 81

Custom—Pre-emption—Re-sale to vendor.

Where before the institution of a suit for pre-emption of land the vendees had resold the land to the vendor and it was contended that the re-sale was a bar to the suit—

Held, that the contention was not valid. *I. L. R., XXIX All., p. 125 dissented from.*

SUKHA v. ABURA MAL. 165

———*Pre-emption—Sharik shikmi—Wajib-ul-arz. Entries in—Record of custom in favor of collaterals in first settlement—Presumption.*

Held, that jointness of holding was not essential to the status of *sharik shikmi*, the term being applicable where the family bond of union still exists.

When the earlier *Wajib-ul-arz* of 1855 allowed right of pre-emption in favour of *sharikan shikmi* and the subsequent record of rights merely referred to the provisions of Act IV of 1872—

Held, that the entry in the *Wajib-ul-arz* raised a presumption of the existence of the custom of pre-emption.

ALLAH DITTA v. SHAHUA. 175

———*Pre-emption—Shops—Katra Patrangan of Amritsar city.*

Held, that the plaintiff had failed to prove that a custom of pre-emption in respect of sales of shops existed in *Katra Patrangan* of Amritsar city.

KARIM BAKHSH v. WATTA MAL. 7

———*Pre-emption—Waiver—Pre-emptor receiving from the vendee mortgagee money due to him.*

Held, that a pre-emptor cannot be deemed to have waived his right of pre-emption by simply receiving from the vendee mortgage-money due to him on the security of the property subject of the sale.

FAZAL DAD KHAN v. SAWAN SINGH. 39

	No.
CUSTOM—SUCCESSION—: <i>See</i> HINDU LAW.	113
———SUCCESSION—: <i>See</i> SPECIFIC RELIEF ACT (I OF 1877), SECTION 42.	99

———*Succession—Adopted son's right to succeed collaterally in adoptive father's family—Burden of proof—Chima Jats of Daska Tahsil, Sialkote District.*

Held, that the defendants on whom the *onus* lay had failed to prove that among *Chima Jats* of *Daska Tahsil* of *Sialkote District* an adopted son can succeed collaterally in his adoptive father's family. 12 *P. R.*, 1892 (*F. B.*), 61 *P. R.*, 1894, 138 *P. R.*, 1894, 29 *P. R.* 1895, 18 *P. R.*, 1900, s. o. *P. L. R.*, 1900 *P. R.* 4 *P. R.* 1906, s. o., 55 *P. L. R.* 1906 referred to.

RAM DITTA v. TAKHAT MAL. 67

———*Succession—Ancestral property. Forfeiture of, by Government on owner absconding—Reversioner. Right of—Criminal Procedure Code (Act V of 1898), Sections 87, 88.*

Held, by Clark, C. J., and Chatterji, J., Johnstone, J. *dissentiente*, that when ancestral land belonging to a person subject to Customary Law is forfeited to Government it does not extinguish the rights of his heirs and reversioners to recover the land on his death from any person who may be in possession of it at the instance of Government by sale or otherwise.

SADHU SINGH v. THE SECRETARY OF STATE FOR INDIA
156 (*F. B.*)

———*Succession—Chundawand and Pagwand—Gujars of Hailakh village, Shakargarh tahsil Gurdaspur District.*

Held, that the party who alleges, that *chandawand* and not *pagwand* rule of succession governs his case is bound to establish the allegation, and that such custom was not proved to exist among *Gujars* of *Hailakh village, Shakargarh tahsil* of *Gurdaspur District*, 134 *P. R.* 1892, 74 *P. R.* 1898, 46 *P. R.* 1897, 12 *P. R.* 1899, 22 *P. R.* 1899, 29 *P. R.* 1900, S. C., *P. L. R.* 1900, *P.* 442 148 *P. R.* 1908 referred to 101 *P. R.* 1879 followed.

RANJHA v. BULANDA. 217

CUSTOM—*Succession*—Khanadamad's khanadamad—Gujars
of Gujrat District.

Held, that among *Gujars* of Gujrat District custom does not allow a *khanadamad* to appoint his own *khanadamad* as heir entitled to inherit ancestral property which the first *khanadamad* had got from his appointer.

SHARFO v. RAMZAN. 20

—*Succession*—*Sister's grandson*—Thakar Rajputs in
Dada Siba Jagir, Kangra District.

Held, that the defendant, on whom the *onus* lay, had failed to prove that among *Thakar Rajputs* in *Dada Siba Jagir*, Kangra District, a sister's grandson was entitled to succeed to the ancestral property of his maternal uncle as against the *ala malik jagirdar*.

GURDITTA v. JAI SINGH. 31

—*Succession*—*Sister not entitled to succeed as daughter*
of father of deceased.

Held, that when a proprietor following the Customary Law dies leaving a sister she cannot claim to succeed to the land left by him as daughter of his father. She may succeed as sister only when custom recognizes her right as such.

HAMIRA v. RAM SINGH. 74. (F.B.)

—*Succession*—*Widow—Collaterals—Right of widow*
of low caste against collaterals—*Sahawal Rajputs* of
Fatehjang tahsil of *Attock district*—*Punjab Land*
Revenue Act (XVII of 1887) section 44—Presumption—
Custom—Chakwar statement of custom.

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that among *Sahawal Rajputs* of *Fatehjang tahsil* of *Attock district*, a widow of inferior caste was not entitled to a life estate but only to maintenance in the presence of collaterals of her deceased husband.

Held, also that as the *chakwar* statement of custom prepared at the time of settlement of the Rawalpindi district, did not form part of the Settlement Record it was not entitled to a presumption of correctness under section 44 of the Punjab Land Revenue Act. 44 P. R. 1907 referred to.

PIR BAKHSH v. SARDAR BANO. 209

CUSTOM—*Succession—Will—Daughter—Widow—Awans of Rawalpindi District—Burden of proof.*

Held, that according to custom among *Awans* of Rawalpindi district, a childless male proprietor may alienate his ancestral property by will or gift in favor of his daughter, and his brother cannot take exception to it. Wills and gifts stand on the same footing. Case law on customs among *Awans* generally discussed.

AMIR ALI v. *Mussammat* BAGGO. 4

D

DECLARATORY SUIT — : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTION 53.	58
————— : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTION 283.	212
————— : <i>See</i> CUSTOM—MARRIAGE.	152
————— BY OCCUPANCY TENANT DENYING LIABILITY TO HAQ BUA : <i>See</i> JURISDICTION OF CIVIL AND REVENUE COURTS.	171
————— : <i>See</i> SPECIFIC RELIEF ACT (I OF 1877), SECTION 42.	51, 99
DECREE : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTIONS 2 AND 523.	50
———— INTERPRETATION OF — : <i>See</i> TRANSFER OF JUDGE.	41
DEFAMATION — : <i>See</i> CRIMINAL PROCEDURE CODE, SECTION 198.	112

	No.
DEKKAN AGRICULTURISTS RELIEF ACT, XVII OF 1879, AS AMENDED— : <i>See</i> CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECTIONS 11, 57, 558 (6).	85
DEPOSIT—SUIT BY HEIR FOR RECOVERY OF MOVABLE PROPERTY DEPOSITED BY OWNER— : <i>See</i> JURISDICTION.	98
DISCRETION— : <i>See</i> PUNJAB LAND REVENUE ACT (XVII OF 1887), SECTION 28, RULES UNDER.	84
DISCRETION — : <i>See</i> REVISION—CRIMINAL CASES.	152
DISMISSAL FOR DEFAULT— : <i>See</i> CIVIL PROCEDURE CODE, SECTIONS 102 AND 103.	169
————— : <i>See</i> CIVIL PROCEDURE CODE, SECTION 103.	33
————— : <i>See</i> JURISDICTION.	98
DISPUTE RELATING TO IMMOVABLE PROPERTY — : <i>See</i> CRIMINAL PROCEDURE CODE, SECTIONS 145 AND 439.	71
DIVORCE— : <i>See</i> CUSTOM—MARRIAGE.	152
DOWER— : <i>See</i> CUSTOM—MUHAMMADAN LAW.	188

H

EJECTMENT BY REVENUE COURT FROM LAND NOT INCLUDED IN THE TENANTS, HOLDING— : <i>See</i> JURISDICTION OF CIVIL AND REVENUE COURTS.	124
EQUITY— : <i>See</i> GUARDIAN AND WARD.	191
ESTOPPEL— : <i>See</i> CUSTOM—ALIENATION.	14
Estoppel— <i>Execution of decree—Claim partly decreed— Appeal for dismissed portion not barred by plaintiff seeking execution of the decree passed in his favour.</i>	

Held, by the Full Bench, that a plaintiff who has obtained a decree for a part of his claim and has appealed as regards the part dismissed is not debarred from prosecuting the appeal because he has begun to execute the said decree.—82 P. R., 1868 *overruled*.

RAGHU MAL v. BANDU. 1 (F. B)

	No.
EUROPEAN BRITISH SUBJECT : <i>See</i> CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTION 454.	136
EVIDENCE ACT (I OF 1872) SECTION 26 : <i>See</i> CRIMINAL PROCEDURE CODE, SECTION 164.	46
<hr/>	
<i>Section 27—Confession—Accused pointing out stolen property concealed in a pond.</i>	
<p>The accused pointed out the place in the pond where the bundle of stolen ornaments was recovered. The prosecution alleged that the accused had said to the police that he had buried the things in the pond.</p> <p><i>Held</i>, that the statement of the accused was inadmissible in evidence.</p>	
KAKA SINGH v. THE KING EMPEROR. 155	
<hr/>	
<i>Section 112—Evidence—Legitimacy—Child born after marriage.</i>	
<p>Where it was contended that a boy born about 7½ months after the marriage of his mother must be considered as illegitimate.</p> <p><i>Held</i>, that the contention was not valid.</p> <p>That the time which elapsed between marriage and birth is altogether immaterial for determining legitimacy. A child born during wedlock is presumed to be the legitimate issue, no matter how soon the birth be after marriage.</p>	
UMRA v. MUHAMMAD HAYAT. 194	
EVIDENCE—JUDGMENTS — : <i>See</i> CUSTOM—PRE-EMPTION.	69
EVIDENCE OF MARRIAGE— : <i>See</i> CUSTOM—HINDU LAW.	64
EXECUTION OF DECREE— : <i>See</i> CIVIL PROCEDURE CODE, SECTION 244.	23
_____ : <i>See</i> CIVIL PROCEDURE CODE, SECTION 311.	21
_____ : <i>See</i> ESTOPPEL.	1 (F. B.)
_____ : <i>See</i> LIMITATION ACT (XV OF 1877) SCHEDULE II, ARTICLE 179 (2).	87, 125

EXECUTION OF DECREE—ATTACHMENT—OBJECTION AGAINST—: <i>See</i> CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 283.	212
—————-LIMITATION : <i>See</i> CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 230.	8,121
—————- : <i>See</i> RULINGS OF CHIEF COURT.	207 (F.B.)
—————-RATEABLE DISTRIBUTION OF ASSETS—: <i>See</i> CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 295.	119
—————-STAY OF EXECUTION : <i>See</i> CIVIL PROCEDURE CODE, SECTIONS 223, 243.	205
EX-PARTE HEARING OF CASE BY ARBITRATOR—: <i>See</i> CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 521.	159

F

FALSE REPORT TO POLICE—: <i>See</i> CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTION 195.	211
FAMILY CUSTOM—: <i>See</i> CUSTOM—MUHAMMADAN LAW.	154
FINDING OF FACT—QUESTION WHETHER OSTENSIBLE MORTGAGE IS IN REALITY A MORTGAGE : <i>See</i> CUSTOM—PRE-EMPTION.	104
FATHER'S DEBTS—: <i>See</i> HINDU LAW.	218
FOODS, SALE OF FOOD UNFIT FOR USE BY HUMAN BEINGS—: <i>See</i> PENAL CODE (ACT XLV OF 1860), SECTION 273.	139
FORFEITURE OF PROPERTY—: <i>See</i> PENAL CODE (ACT XLV OF 1860), SECTION 62.	147
FORFEITURE OF PROPERTY BY GOVERNMENT ON OWNER ABSCOND- ING : <i>See</i> CUSTOM—SUCCESSION.	156. (F.B.)
FRAUDULENT EXECUTION OF DEED TO STAVE OFF PRE-EMPTION SUITS : <i>See</i> PENAL CODE (ACT XLV OF 1860), SECTION 423.	54
FURTHER APPEAL : <i>See</i> PUNJAB COURTS ACT (XVIII OF 1884), SECTION 40 (1) AS AMENDED BY ACT XXV OF 1899, 66, 197, 199.	
FURTHER APPEAL—VALUATION OF SUIT : <i>See</i> JURISDICTION 129 (F.B).	

G

GARDEN—: *See* COURT-FEES ACT (VII OF 1870) SECTION 7 V (E). 61

GIFT : *See* CUSTOM—ALIENATION BY CHILDLESS MALE PROPRIETOR 22, 28, 59, 115, 162, 201

GOOD FAITH : *See* CUSTOM—PRE-EMPTION. 53

GRAVEYARD—: *See* MUHAMMADAN LAW. 78

Guardian and Ward -Muhammadan Law—Compromise by brother on behalf of minor brother—Suit by minor through next friend contesting compromise - Equity.

Where a Muhammadan minor through a next friend impugned a compromise effected on his behalf by his elder brother, who was his *de facto* guardian, without offering to pay benefit received by the minor under the compromise—

Held, that though the brother was not competent under Muhammadan Law to make the compromise, the suit must be dismissed, leaving plaintiff liberty to sue if he is so advised when he attains majority.

NUR MUHAMMAD v. *Mussammatt* AIMNA. 191

H

HAQ BUA :—*See* JURISDICTION OF CIVIL AND REVENUE COURTS. 171

HAQ SEP—SUIT BY A CHAMAR FOR RECOVERY OF HAQ SEP—: *See* PUNJAB TENANCY ACT (XVI OF 1887) SECTION 77 (3) (J). 178

HINDU LAW : *See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 13. 95

————— : *See* CUSTOM—HINDU LAW. 9, 64, 158, 167, 181

————— : *See* CUSTOM—SUCCESSION 94

No.

HINDU **LAW—Custom—Pleadings—Adoption—Succession,**
Right of collaterals of adoptive father to succeed to the
property of adopted son.

It cannot be urged for the first time on appeal that the case should be decided according to general custom when the case has been decided according to the personal law of the parties on their pleadings in which they have admitted that they do not know of any custom contrary to their personal law. Under Hindu Law a daughter's son cannot be adopted in the *dattaka* form by twice-born classes.

The family of the adopted son is not altered and no relationship with the adoptive father's collateral relations is established when adoption is not according to *dattaka* form, but according to established custom prevailing among non-agriculturists or *kritrima* form.

BAIJ NATH v. SHAMBOO NATH. 113

———*Document, construction of—Will in favor of female—Malik waris.*

Held, that a will in favor of a Hindu female conferring upon her rights of an owner and heir gives her heritable and transferable rights in the property bequeathed to her *I. L. R.*, XXX, All. 84 (*P. C.*) referred to.

VAISHNO DAS v. Mussammat DEOKI. 214

———*Father's debts—Liability of estate after father's death—Price of liquor supplied to father.*

Held, that according to both *Mitakshara* and *Dayabhaga* schools of Hindu Law, joint family property in the hands of the son is not liable for the debt contracted by his deceased father for liquor supplied to the latter.

KHAGINDRA NATH DAS v. NANAK CHAND. 218

———*Maintenance—Wife's right of residence in ancestral family house against creditors' right to sell it to recover family debts.*

Held, that a Hindu widow or wife is not entitled to claim residence in the family dwelling house against

the creditors' right to proceed against it in execution of a decree obtained by him to recover just family debts.

Nihal Devi v. Shib Dial. 11

HINDU LAW—*Marriage not dissolved by apostacy of one of the parties.*

Held, that apostacy of one of the parties to a marriage in the case of Hindus, does not *per se* annul the marriage, and a Hindu husband's suit for restitution of conjugal rights cannot be defeated by the fact of the wife's conversion to Islam after her marriage with the plaintiff.

Mussammatt Jamna Devi v. Mul Raj. 83

HOUSE BREAKING BY NIGHT:—*See* PENAL CODE (ACT XLV OF 1860), SECTIONS 443, 447, 457, 511. 56

HURT:—*See* PENAL CODE (ACT XLV OF 1860) SECTIONS 304, 323. 77

I

IMMOVABLE PROPERTY:—*See* LIMITATION ACT (XV OF 1877), SECTION 28. 163

INDEMNITY—PERSONAL COVENANT—INDEMNITY AGAINST DISTURBANCE TO VENDEE DOES NOT ENURE FOR THE BENEFIT OF PRE-EMPTOR:—*See* VENDOR AND PURCHASER. 57

INJUNCTION:—*See* NORTHERN INDIA CANAL AND DRAINAGE ACT. SECTIONS 21, 22, 24, 25. 16

INJUNCTION ISSUED BY MUNICIPALITY:—*See* PUNJAB MUNICIPAL ACT (XX OF 1891) SECTION 120 E, AS AMENDED BY PUNJAB ACT (III OF 1900). 196

INSOLVENCY PROCEEDINGS:—*See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTIONS 351, 352. 89

INSTALMENTS:—*See* REGULATION XVII OF 1806, SECTION 8. 38

INTEREST:—*See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 13. 95

—————**—***Compound interest on money awarded to vendee, See* PUNJAB LAWS ACT (IV OF 1872) SECTIONS 12, 15. 109

INTEREST—PRINCIPAL AND INTEREST BOTH FALLING DUE: See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 43. 93

J

JUDGMENT :— *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTIONS 202, 623. 40

JUDGMENT OF CRIMINAL COURT ON APPEAL. CONTENTS OF : *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTIONS 367, 424. 55

JUDICIAL PROCEEDING :—*See* REVISION—CRIMINAL CASES 42

JURISDICTION—QUESTION AS TO :—*See* PUNJAB COURTS ACT (XVIII OF 1884) AS AMENDED, SECTION 70 (1), (b). 6

JURISDICTION—*Small Cause—Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 18—Suit by heir for recovery of movable property deposited by owner—Civil Procedure Code (Act XIV of 1882), Section 158—Dismissal for default—Non-service of summonses on witnesses—Procedure.*

Held, that a suit by an heir for recovery of movable property or its price against the defendant with whom the owner had deposited it for safe custody is not excepted from the jurisdiction of the Court of Small Causes. Such a claim does not fall within article 18 of the second schedule of the Provincial Small Cause Courts Act.

Held, that the provisions of Section 158 of the Civil Procedure Code should only be resorted to when no other provisions of the Code are applicable to the case and they do not permit of summary dismissal of the suit without considering the evidence on record produced by the plaintiff.

Mussammatt KARTAR DEVI v. Mussammatt SURASTI. 98

—Valuation of suit—Appeal—Further appeal—Claim for possession of house—Decree on payment of certain sum for improvements—Court Fees Act (VII of 1870) Sections 7 V (e), 9.

In a suit for possession of a house the plaintiff is bound to state market value of the house and he must pay Court-fee on the value stated by him. When it appears to it or the defendant pleads that the plaintiff has under-estimated his claim, the Court ought to take immediate steps under section 9 of the Court Fees Act

for ascertaining the market value and order deficiency in Court-fee to be made up, if enquiry shows that the value has actually been under-estimated by the plaintiff. The value fixed by the plaintiff is a tentative one, and it is the value found by Court, and not that stated by the plaintiff, that governs the jurisdiction of the original Court. Where it exceeds the jurisdiction of the Court, the Court must return the plaint for presentation to proper Court, at whatever stage of the suit the true value may be determined by it. Similarly, the Appellate Court has no jurisdiction to adjudicate on the appeal when it finds that the value of the suit exceeds its pecuniary jurisdiction.

The plaintiff sued for possession of a house which he valued at Rs. 90 in the Court of a *Munsif* of the 1st Class, and obtained a decree for possession on payment of Rs. 634-7-0, value of improvements to the house by the defendant. He appealed to the District Judge against so much of the decree as awarded compensation for improvements, and the District Judge held that he had jurisdiction to hear the appeal.

Held, by the Full Bench, that the District Judge had no jurisdiction to entertain the appeal.

ABDUL RAHMAN v. CHARAG DIN 129 (F.B.)

JURISDICTION OF CIVIL AND REVENUE COURTS : *See* PUNJAB
COURTS ACT (XVIII OF 1884), SECTIONS 40, 70 (a). 91

————— *See* PUNJAB
TENANCY ACT (XVI OF 1887), SECTION 77 (3), (d). 26, 187

————— : *See* PUNJAB
TENANCY ACT (XVI OF 1887) SECTION 77 (3) (j). 120, 178

————— : *See* PUNJAB
TENANCY ACT (XVI OF 1887), SECTION 77 (3) (n). 80

————— : *See* PUNJAB
TENANCY ACT XVI OF 1887), SECTION 100). 202

————— *Occupancy
tenant—Ejectment by Revenue Court from land not
included in the tenant's holding—Suit for recovery of
possession by tenant—Res-judicata.*

No.

The plaintiff took some land on lease from the defendants who sued for his ejectment in a Revenue Court and obtained a decree which included the land now in dispute. He was ejected in execution. In the present suit he alleged that the land in suit was included in the Revenue Court's decree by mistake and without his knowledge, and that it was not included in the land leased to him. He stated that he had become owner of the land by adverse possession and claimed its possession.

Held, that the suit was exclusively cognizable by Civil Court, and that the decree of the Revenue Court was by reason of that Court's inability to entertain the present suit no bar under Section 13 of the Civil Procedure Code to the hearing of the present suit.

SHIB DIAL *v.* *Mussammat* CHIRAGH BIBI. 124

JURISDICTION OF CIVIL AND REVENUE COURTS—*Punjab Tenancy Act (XVI of 1887), Sections 14, 77 (3) (u)—Landlord and Tenant.*

The plaintiff, an occupancy tenant, sued the defendant for damages for preventing him from cultivating land of his holding. It was not alleged that the defendant had been in possession of the land or had occupied it.

Held, that the suit was triable by the Civil Court.

MIRAN BAKHSH *v.* GHANAYA. 114

— *Punjab Tenancy (Act XVI of 1887), Section 77 (3) (j)—Landlord and Tenant—Occupancy tenant—Haq bua—(Door tax)—Declaratory suit by occupancy tenant denying liability.*

Held, by the Full Bench, that a suit for a declaration that the plaintiffs, who are occupancy tenants, resident in a village are not liable to pay 'door tax' (Haq bua) is cognizable by the Revenue Court and not by the Civil Court.

GAMUN *v.* KARIM KHAN. 171 (F. B.)

JURISDICTION OF CIVIL COURT—*Suit for declaration that plaintiff had muquarraridari rights in land—Registration Act (III of 1877) Section 17(d)—Lease—Documents constituting perpetual lease.*

The plaintiff sued for a declaration that he had *muquarraridari* rights in the *shamilat* of a village created by deeds executed by or on behalf of the proprietary body who owned the *shamilat*.

Held, (1) that the suit was cognizable by Civil Court;
(2) that the deeds constituted perpetual lease and not being registered were not admissible in evidence;
(3) that the deeds could not bind those owners who did not join in its execution and that the suits must be dismissed.

JHANDAD KHAN v. ABBAS KHAN 189, Page 639.

————— : *See* NORTHERN INDIA CANAL AND DRAINAGE ACT. SECTIONS 21, 22, 24, 25. 16

————— : *See* PUNJAB MUNICIPAL ACT (XX OF 1891), SECTION 120 E, AS AMENDED BY PUNJAB ACT (III OF 1900). 196

————— : *See* RELIGIOUS INSTITUTION. 176

————— : *See* SUITS VALUATION ACT (VII OF 1887), SECTION 3. 172

JURY—TRIAL BY:—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTION 454. 136

K

KHANA-DAMAD—: *See* CUSTOM—ALIENATION BY CHILDLESS MALE PROPRIETOR. 22

KHANA-DAMAD'S KHANADAMAD : *See* CUSTOM—SUCCESSION 20

KUDHI KAMINI—SUIT FOR RECOVERY OF—: *See* PUNJAB TENANCY ACT (XVI OF 1887), SECTION 77 (3), (j). 120

L

LAND ACQUISITION ACT (I OF 1894), SECTION 31—*Land acquisition—Compensation—Mortgage—Right of mortgagee.*

The mortgagee of property, a portion of which is acquired by Government, is entitled to the whole of

GENERAL INDEX - P. L. R., 1908.

lv.

No.

compensation allowed by Government, when the mortgage-money exceeds the sum awarded as compensation.

TOFAN DASS v. THE SECRETARY OF STATE FOR INDIA
IN COUNCIL. 2

LANDLORD AND TENANT—: See JURISDICTION OF CIVIL
AND REVENUE COURTS, 114, 124, 171, 189 at page 609.

—————: See PUNJAB TENANCY ACT (XVI
OF 1887), SECTION 5 (1) (b). 180

—————: See PUNJAB TENANCY ACT (XVI
OF 1887), SECTIONS 53 AND 60. 44

—————: See PUNJAB TENANCY ACT (XVI
OF 1887), SECTION 50. 18 (F.B.), 32

—————: See PUNJAB TENANCY ACT (XVI
OF 1887), SECTIONS 59, 111, 112. 76

“ LAND ”—VENDEE OWNING SMALL BIT OF CULTURABLE LAND
USED AS BUILDING SITE: See PUNJAB LAWS ACT (IV OF
1872), SECTIONS 12, 15. 109

LAND SUE: See PUNJAB COURTS ACT (XVIII OF 1884), SEC-
TIONS 40, 70 (a). 91

LEASE—: See JURISDICTION OF CIVIL AND REVENUE COURTS. 189
at page 609.

LEGITIMACY—: See EVIDENCE ACT (I OF 1872), SECTION 112. 194
—————See MUHAMMADAN LAW. 190

LIEN: See PUNJAB COURTS ACT, (XVIII OF 1884), SECTION
40 (1) AS AMENDED BY ACT XXV OF 1899. 197

LIMITATION—PRE-EMPTION: See PUNJAB PRE-EMPTION ACT
(II OF 1905) LOCAL, SECTION 28. 122

—————See PRE-EMPTION SUIT. 135

EXECUTION OF DECREE—: See CIVIL PROCEDURE CODE, (ACT
XIV OF 1882), SECTION 230. 121

—————*Suit for compensation for non-delivery of
goods—Effect of special clause that claim would not
be recognized if not made within certain period from
due date of draft.*

The plaintiffs, indentors, sued the defendants for compensation for non-delivery of goods. A condition of the indent was that "no claim or dispute of any sort whatever can be recognized if not made in writing within 60 days from due date of draft." No draft was drawn, for the goods indented were never delivered.

Held, that the condition was inapplicable to the case, for no bill of lading had been sent and no draft had been drawn. It could not be held that the words "due date of draft" mean "the date on which draft drawn for goods shipped had shipment been effected, would have fallen due."

TANNU LAL v. BEHARI LAL. 127

LIMITATION NOT SET UP AS DEFENCE: *See* PUNJAB COURTS ACT (XVIII OF 1884), SECTION 70 (i) (b). 142

LIMITATION ACT (XV OF 1877), SECTION 7—*Custom—Alienation by sonless proprietor—Right of after-born reversioner to object.*

Though a reversioner born after an alienation has been made is, under certain conditions, competent to contest its validity, yet he can only do so if the period of limitation had not expired before the date of his birth and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim extension of time under Section 7 of the Limitation Act.

UMRA v. GHULAM. 27

Section 22—*Limitation—Addition of defendant after expiry of limitation period.*

Section 22 of the Limitation Act does not apply when the original suit is continued against the added defendant, who derives his title from the original defendant by an assignment pending the suit.

A pre-emptor's suit cannot be dismissed as barred by limitation by the operation of Section 22 of the Limitation Act, when the vendee transfers the property in dispute after the institution of the suit for pre-emption, and the transferee's name is added as a co-

No.

defendant at a time when the original claim would be barred by limitation.

FATEH MUHAMMAD v. SAID AHMAD. 3

LIMITATION ACT (XV OF 1877), Section 28, Schedule II, Article 148—*Adverse possession—Immovable property—Right to birt—Exclusive enjoyment by mortgagee.*

The right of a Hindu to *birt* is in the nature of immovable property and article 148 of the second Schedule of the Limitation Act governs a suit for redemption of a mortgage thereof.

Section 28 of the Limitation Act is applicable to a claim to a mortgagee's right to *birt*, such right being on the footing of a mortgage of immovable property.

And exclusive adverse enjoyment of *birt* by the mortgagee or his representatives for more than twelve years extinguishes the right of persons claiming a share to the mortgage money in a suit for redemption.

MOHAN LAL v. JANKI. 163

SCHEDULE II,
Article 10—*Limitation—Pre-emption suit—Property in suit in possession of tenant—Property capable of physical possession.*

Held, that property in the possession of tenants cannot be said to be capable of physical possession within the meaning of Article 10 of second schedule of the Limitation Act. P. R. 88 of 1905, s. o., 179 P. L. R. 1905 explained, I. L. R., XXIV All., 18 (P. C.), 16 P. R. 1902, 73 P. R. 1885, 48 P. R. 1884, followed.

GHULAM MUSTAFA v. SHARAB-UD-DIN KHAN. 63 (F.B.)

Article 10: See PRE-EMPTION.

75

Article 44—*Limitation—Minor—Suit for possession of immovable property—Muhammadan Law—Transfer by de facto, but not legal guardian.*

An alienation by a *de facto* guardian who is not legal guardian of the minor and is not authorised by custom to transfer his ward's property is void, and the suit

No.

brought by the minor after attaining majority for possession of immovable property against the transferee from such guardian is not governed by article 44 of the second schedule of the Limitation Act, for it is not necessary for the minor to have alienation set aside.

SARDAR SHAH v. HAJI 182

LIMITATION ACT (XV of 1877), *Schedule II, Article 118*
—*Limitation—Adoption—Suit for possession of immovable property in which defendant sets up adoption as defence in support of right to hold property.*

When a suit for possession of immovable property is filed and the defendant sets up right to hold the property by reason of his being the adopted son of the deceased owner of the property—

Held, that article 118 of the second Schedule of the Limitation Act applies to the case, and the period of limitation begins to run from the date the alleged adoption became known to the plaintiff.

ISHAR v. PARTAP SINGH. 13

ARTICLES 134,

144: *See CIVIL PROCEDURE CODE, SECTION 44.* ---102 (F.B.)

Article 179 *Ex-*

ecution of decree—Limitation—Application in accordance with law—Notice issued to judgment-debtor in execution of an application not in accordance with law.

The plaintiff obtained a decree to the effect that according to the compromise between the parties the defendant shall mortgage certain land to the plaintiff in lieu of a certain sum of money, within one month from the date of the decree. The mortgage was not executed. Within three years of the decree the decree-holder applied for execution by being placed in possession of the land specified, and on the same date notice issued to the judgment-debtor under Section 248 of the Civil Procedure Code to show cause against execution issuing.

It was held that the decree-holder was not entitled to possession under the decree. The decree-holder withdrew his application, and subsequently applied under Section 260 of the Civil Procedure Code for the arrest of the judgment-debtor and attachment of her movables after the expiry of more than three years from the date of the decree.

Held, that the later application was barred by limitation and that it was not saved by the previous application, for it was not in accordance with law and that the payment of any process-fee did not improve the position of the decree-holder.

GANGA RAM *v.* Mussammat DURGI. 125

—————ARTICLE 179 :
See RULINGS OF CHIEF COURT. 207 (F. B.)

—————ARTICLE 179,
CLAUSE 2 : See CIVIL PROCEDURE CODE, SECTION 230. 8

—————Article 179,
(2)—*Limitation—Execution of decree Withdrawal of appeal.*

When an appeal is withdrawn the appellant cannot claim to count the period of three years allowed for execution of the decree, originally passed in his favour by the Lower Court, from the date of his withdrawing the appeal. He has only three years from the date on which the original Court passed the decree.

BHAGWAN SINGH *v.* MOHAN LAL. 87

Lis pendens: See CIVIL PROCEDURE CODE (ACT XIV OF 1882),
SECTIONS 213, 252, 276. 52

—————: See PRE-EMPTION SUIT. 145

M.

MAHANT : See RELIGIOUS INSTITUTION. 108

MAINTENANCE : See CUSTOM—MUHAMMADAN LAW. 154

—————: See HINDU LAW. 11

MARRIAGE : See CUSTOM—MARRIAGE. 152

—————: See MUHAMMADAN LAW. 190

MARRIAGE OF A *Rajput* with a *Khatrani*. VALIDITY OF—: See
CUSTOM—HINDU LAW. 64

MARRIAGE OF A *Rajput* with a *Mahajan* woman : See CUSTOM
—HINDU LAW. 150

MARRIAGE NOT DISSOLVED BY APOSTACY OF ONE OF THE PARTIES :
See HINDU LAW. 83

MATERIAL IRREGULARITY : See PUNJAB COURTS ACT (XVIII
OF 1884), SECTION 70 (1). 142, 173

MINOR—TRANSFER BY *de facto*, BUT NOT LEGAL GUARDIAN : See
LIMITATION ACT (XV OF 1877), SCHEDULE II, ARTICLE 44. 182

MISJOINDER OF CAUSES OF ACTION : See CIVIL PROCEDURE CODE
SECTION 44. 102 (F.B.)

	No.
MORTGAGE : <i>See</i> LAND ACQUISITION ACT (I OF 1894), SECTION 31.	2
MORTGAGE : <i>See</i> PUNJAB COURTS ACT (XVIII OF 1884) SECTION 40 (1), AS AMENDED BY ACT XXV OF 1899.	197
————EXCLUSIVE ENJOYMENT BY MORTGAGEE : <i>See</i> LIMITATION ACT (XV OF 1877) SECTION 28.	163
————MORTGAGOR AND MORTGAGEE : <i>See</i> ADVERSE POSSESSION	90
————BY HEIR : <i>See</i> CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTIONS 213, 252, 276.	52
————BY WAY OF CONDITIONAL SALE-- <i>See</i> REGULATION XVII OF 1806, SECTION 8.	38, 192
————— <i>See</i> VALUATION OF SUIT.	141
————IN FAVOR OF AGRICULTURIST BENEFITING MORTGAGOR'S CREDITORS—DUTY TO ENFORCE : <i>See</i> PUNJAB ALIENATION OF LAND ACT (XIII OF 1900).	48
————WITH POSSESSION—ACCOUNTS—DUTY OF MORTGAGEE— <i>See</i> CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 13.	95
————— <i>Incomplete transaction.</i>	

When the part of the mortgage-money remaining unpaid by the mortgagee consisted of a sum which the mortgagor had agreed should be withheld by the mortgagee till mutation of names, and a small sum out of that promised for expenses of the deed, and the mutation of names did not take place at all—

Held, that the mortgage could not be held as incomplete for default in payment of the mortgage-money

MANGLADHA v. LAL CHAND. 60

—————*Incomplete transaction--Failure of mortgagee to pay mortgage-money to mortgagor or previous incumbrancer.*

Held, by the Full Bench, that in the absence of a special contract to the contrary, when a mortgagee fails to pay to the mortgagor or a previous incumbrancer the whole or a portion of the mortgage money at the time fixed for payment or within reasonable time when no time is fixed therefor, the mortgage transaction remains incomplete and the mortgagee is not entitled to any benefit under the mortgage even on

No.

payment of the unpaid mortgage-money; it is immaterial whether the non-payment has, or has not, caused inconvenience or loss to the mortgagor.—16 P. R., 1884, *dissented from*.

GOKAL CHAND v. RAHMAN. 62

MORTGAGE—REDEMPTION SUIT—*See* CIVIL PROCEDURE CODE, ACT XIV OF 1882, SECTION 13. 164

—————*See* CIVIL PROCEDURE CODE, SECTIONS 102, 103. 169

————— : *See* TRANSFER OF JUDGE. 41

—————*Redemption—Onerous condition—Condition as to mortgage being not redeemable for 60 years enforced.*

The mortgagor specifically agreed with the mortgagee that he should not be entitled to redeem until after the expiry of 60 years. The purchaser of the mortgaged property from the mortgagor sued for redemption and contended that the condition as to redemption was so inequitable and onerous that relief from it should be given on equitable grounds and it should be struck out.

Held, that the contention was not valid and redemption could not be allowed to the plaintiff before the expiry of the stipulated period.

RALLA v. AMIN CHAND. 126

Muafi. RESUMPTION OF—PUNJAB TENANCY ACT (XVI OF 1887) SECTION 5 (1) 'b). 180

MUNICIPALITY: *See* PUNJAB MUNICIPAL ACT (XX OF 1891), SECTION 120 E, AS AMENDED BY PUNJAB ACT (III OF 1900). 196

MUHAMMADAN LAW : *See* CUSTOM—MUHAMMADAN LAW. 9, 10, 154, 188, 206.

—————*See* GUARDIAN AND WARD. 191

—————*See* LIMITATION ACT (XV OF 1877), SCHEDULE II, ARTICLE 44. 182

—————*Marriage—Legitimacy—Acknowledgment of parentage—Alienation by a Sikh Jat in favour of issue from a Muhammadan woman—Declaratory suit to set aside alienation—Dismissal of suit—Appeal by some only of the plaintiffs.*

The Muhammadan Law of acknowledgment of parentage with its legitimizing effect has no reference whatsoever to cases in which illegitimacy of the child is proved and established, either by reason of a lawful

union between the parents of the child being impossible or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relating to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved.

In other words, the doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgment has its effect; but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

Held, that a gift of immovable property by a Sikh *Jat* in favour of his sons by a Muhammadan wife before the alienor embraced Muhammadanism was void, as the alienees could not be regarded as legitimate issue.

Held, also, that where claim of reversioners to set aside an alienation is dismissed and only some of them appeal on their own behalf the Appellate Court, if it accepts the appeal, should grant declaration as to the right of the appellants and not the reversioner who did not join in the appeal.

KHUSHAL SINGH v. JAIMAL. 190

MUHAMMADAN LAW—*Wakf—Dedication—User—Graveyard—Alienation of land pertaining to graveyard—Civil Procedure Code (Act XIV of 1882), Sections 30 and 539—Suit by members of a community—Individual right.*

The plaintiffs, some Muhammadans of Multan City, sued the Court of Wards representing the estate of *Khan Bahadur Makhdum Hassan Bakhsh* for a declaration that the land in suit situate in *Mauza Taraf Daria, Tahsil Multan*, was a graveyard in possession of the Muhammadan community, and for an injunction restraining the defendant from transferring any part of the land. It was alleged by the plaintiffs that the whole of the land in suit was the graveyard known as *Mai Pak Daman* and was *wakf* and inalienable.

Held, that the plaintiffs had proved that the land in suit was graveyard known as *Mai Pak Daman* and was *wakf* by user, if not by dedication.

No.

That user, as such, does not deprive the owner of his title, but title remains subject to the user of the land as *wakf*. I. L. R., XXVI Bom. 198, *referred to*.

That the plaintiffs, as members of the Muhammadan community were competent to institute the suit, and sections 30 and 539 of the Civil Procedure Code did not apply to the case, that it was not necessary for each plaintiff to show that he had used the graveyard; a new comer, for instance, if a Muhammadan, had an equal right with the oldest residents.

That by the fact that previously some portions of the land pertaining to the graveyard had been alienated without objection on the part of any one, the plaintiffs did not lose their right to object to further alienation.

ILAH I BAKHSH v. THE COURT OF WARDS OF THE PROPERTY OF KHAN BAHADUR MAKHDUM HASSAN BAKHSH. 78

MUHAMMADAN LAW—*Will—Bequest for charitable purposes.*

A will executed by a Muhammadan authorising executors "to spend the money for such charitable objects as they think proper, or they shall give it to whomsoever I direct, or use it in such a way after my death that I may obtain eternal bliss."

Held, that the bequest was invalid, and no effect could be given to it.

SHAHAB-UD-DIN v. SOHAN LAL. 168

MUQARRARIDARI RIGHTS. SUIT FOR DECLARATION OF:—*See* PUNJAB TENANCY ACT (XVI OF 1887), SECTION 77 (3) (d). 187

————— SUIT FOR DECLARATION THAT PLAINTIFF HAD *Muqarraridari* RIGHTS IN LAND: *See* JURISDICTION OF CIVIL AND REVENUE COURT. 189 at page 609

MUTATION PROCEEDINGS—*Presumption—Burden of proof.*

Held, that the mutation in favour of the defendant was surrounded by suspicious circumstances and that he had failed to prove that he was legitimate son of his father.

KADIR BAKHSH v. AZIZ MUHAMMAD. 200

IN.

NECESSITY: *See* CUSTOM—MUHAMMADAN LAW. 10

NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII of 1873), Sections 21, 22, 24, 25—*Canals—Jurisdiction of Civil*

Court—Injunction against party to whom permission is given to construct channel through, the land of another.

When permission has been granted to a person under the Canals Act, (VIII of 1873) to construct a water channel through the land of another and the procedure prescribed by the Act has been complied with, the Civil Court cannot entertain a suit for an injunction against the party to whom permission is given restraining him from constructing the channel.

MOKHAM DIN v. MANSAB DAR. 16

NOTICE : *See* VALUATION OF SUIT. 141

O.

OCCUPANCY RIGHT—*See* PUNJAB TENANCY ACT (XVI OF 1887), SECTION 5 (1) (b). 180

—————*See* PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 8, and 59. 107

—————*See* PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 53 AND 60. 44

————— : *See* PUNJAB TENANCY ACT (XVI OF 1887), SECTION 59. 32

—————*See* PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 59, 111, 112. 76

—————TENANT *See* JURISDICTION OF CIVIL AND REVENUE COURTS. 124, 171

ONUS PROBANDI : *See* CUSTOM—HINDU LAW. 9

P.

PARDON—*See* REVISION—CRIMINAL CASE. 157

PARTY, ADDITION OF : *See* LIMITATION ACT (XV OF 1877), SECTION 22. 3

PARTIES—*See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 26. 189 at page 611

—————STRIKING OFF OF DEFENDANT AFTER FIRST HEARING : *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 32. 37

PARTITION—*See* COMMON LAND. 118

—————Abadi—*Partition of a portion of joint property not allowed.*

The plaintiff claimed to have bought certain shares from some of the co-sharers in the *shamilat abadi* of a

panah in a village and sued for partition and separate possession of the *abadi* equal to the shares bought by him.

Held, that as there was other *shamilat panah* in the village the quit being one for partial partition, could not be allowed.

SHEO NATH v. PARMA NAND. 151

PARTITION-DEED: *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTIONS 520, 525, 526. 184

—PROCEEDINGS: *See* PUNJAB COURTS ACT (XVIII OF 1884), SECTIONS 40 and 70 (a). 91

PARTNERS—*See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 26. 189 at page 611

—LIABILITY OF RETIRING PARTNER. *See* CONTRACT ACT (IX OF 1872), SECTION 245. 137

PARTNERSHIP. *Dissolution of—Distribution of assets.*

Held, that upon the dissolution of the partnership, if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner, the deficiency is a loss of capital and is to be borne or made good by the partners.

Under Section 253 of the Contract Act the share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss, and partners must contribute equally to losses sustained by the partnership in the absence of a contract to the contrary, the share of loss or profit is ascertained by dividing the total loss or profit by the number of partners.

MAM RAJ v. GOKAL CHAND. 186

PENAL CODE (ACT XLV OF 1860), Section 62—*Sentence—Forfeiture of property—Order of, when may be passed.*

As a general rule the sentence of forfeiture of property of the accused can be justified only in the case of offences of a political nature against the State or affecting the safety of the public or some section of it. Such sentence should never be passed without some previous enquiry as to the amount and nature of the property affected, and as to the persons whose rights as heirs will be thereby superseded in favour of Government. It would, for instance, be unduly harsh to reduce widows and children to destitution for the crimes of the husbands or fathers.

So far as ancestral property is concerned, the order of forfeiture maintains only during the life of the person against whom it is directed and will not affect the reversionary interest of heirs. 18 P.R. 1908 s. c., 156 P.L.R., 1908 *referred to*.

MAGHAR SINGH v. THE KING EMPEROR. 147

PENAL CODE (ACT XLV OF 1860) SECTION 147: *See* CRIMINAL PROCEDURE CODE, (ACT V OF 1898) SECTION 345. 47

-----SECTION 182: *See* CRIMINAL PROCEDURE CODE, (ACT V OF 1898), SECTION 195. 211

-----Section 273—*Food—Sale of food unfit for use by human beings—Sale for animals*

Held, that section 273 of the Indian Penal Code does not make the sale, as horses' food, of grain or fodder unfit for a horse to eat, an offence punishable under the section. The word "public" in Chapter XIV of the Code means human beings in general and does not include animals.

SITA RAM v. THE CROWN. 139.

-----Sections 304, 323,—*Hurt—*

Culpable homicide—Proof—Benefit of doubt—Police putting pressure on witnesses.

The accused was convicted of an offence under section 304, Indian Penal Code, for having stabbed a person with a knife. The occurrence took place between 8 and 9 P. M., in a lane in the city of Lahore. It was dark except for a street lamp in the neighbourhood. It appeared that there were at least five men struggling with deceased and it was difficult to be sure that the witnesses could in fact see who stabbed the deceased. It was found "that great pressure had been brought by the Police to bear on the witnesses to make them give evidence as desired."

The Chief Court set aside the conviction, under section 304 Indian Penal Code, and altered it to one under section 323, Indian Penal Code.

SHIB DAS v. THE CROWN. 77

-----Section 415—*Cheating—Transfer of encumbered property without disclosing encumbrances.*

A person transferring encumbered property as an unencumbered one may be guilty of cheating, and upon a complaint by the transferee the magistrate

ought to record evidence of complainant's witnesses and determine whether there was a dishonest concealment of facts by the accused, knowing that if he stated these facts complainant would not have consented to the transfer in his favour.

I. L. R., XXVII All. 561, not followed.

Mussammatt BEGAM BIBI v. GHULAM MUHAMMAD. 101

PENAL CODE (ACT XLV OF 1860), *Section 423—Fraudulent execution of deed to stave off pre-emption suits.*

The accused executed a fictitious sale-deed in favour of another person to stave off pre-emption suits by parties entitled to the right of pre-emption.

Held, that the accused was guilty of an offence under Section 423 of the Indian Penal Code.

LACHHMAN DAS v. THE CROWN. 54

—Sections 443, 447, 457, 511—*House-breaking by night—Attempt—Going to the roof of a house with a stick and an instrument used for house-breaking.*

Held, that a person who goes at night on the roof of the house of another person with a stick and an instrument used for house-breaking is guilty of a house trespass under Section 447 of the Indian Penal Code and not of an attempt to commit house-breaking by night, an offence punishable under Sections 457 and 511 of the Code.

WALIDAD ALIAS WALYA v. THE CROWN. 56

—SECTION 500 : *See CRIMINAL PROCEDURE CODE, (ACT V OF 1898) SECTION 198.* 112

—SECTION 505 (b) : *See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTION 196.* 149

PHYSICAL POSSESSION—*See LIMITATION ACT (XV OF 1877), SCHEDULE II, ARTICLE 10.* 63

PLAINT, ALLEGATIONS IN : *See PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 77 (3) (d) AND 100.* 26

—TREATED AS APPLICATION FOR EXECUTION OF DECREE : *See CIVIL PROCEDURE CODE, (ACT XIV OF 1882) SECTION 244.* 23

PLEADINGS—*See HINDU LAW.* 118

PLEADINGS—CONSTRUCTION OF : *See* PUNJAB COURTS ACT
(XVIII OF 1884), SECTIONS 40, 70 (a). 91

POLICE, PUTTING PRESSURE ON WITNESSES : *See* PENAL CODE
(ACT XLV OF 1860), SECTIONS 304, 323. 77

PRACTICE—*Transfer of Judge—Propriety of re-opening
questions already decided—Mortgage—Redemption—
Decree—Interpretation of—Accounting.*

When a Judge gives his decision on some of the questions involved in a case leaving the remaining questions to be determined at a subsequent date, the Judge who succeeds him in the meanwhile does not act properly, though not illegally, in passing judgment contrary to the decision given by his predecessor, especially in a case when the judgment is open to appeal. It is only when there is an obvious and patent error in the earlier decision that a successor should re-open a question in an appealable case.

A mortgagee obtained a decree that he was entitled to recover the mortgage money from the mortgaged and other property of the mortgagor and the latter was also made personally liable for a part of the sum decreed. The mortgaged property was in possession of the mortgagee under the terms of the mortgage for profits to be realized in lieu of interest. The mortgagor brought a suit for redemption and claimed deduction of the profits realized by the mortgagee from the amount adjudged against him by the decree.

Held, that the claim was valid under the terms of the decree.

Under the peculiar circumstances of the case, it was ordered that on the mortgagor's failure to redeem within the fixed period he would not be able to redeem in execution of the decree passed in the case.

CHUNI LAL *v.* MIAN GHULAM FARID KHAN. 41

PRELIMINARY POINT : *See* CIVIL PROCEDURE CODE (ACT
XIV OF 1882), SECTION 562. 96, 161

PRIMOGENITURE—*See* CUSTOM—MUHAMMADAN LAW. 154

PRIVY COUNCIL—APPEAL TO : *See* CIVIL PROCEDURE CODE
SECTIONS 562 AND 595. 304

PRE-EMPTION: See CAUSE OF ACTION.	88
-----: See CUSTOM—PREEMPTION. 7, 24, 39, 49, 53, 68, 69, 81, 82, 104, 165, 175, 179, 213.	
-----: See PUNJAB LAWS (ACT IV OF 1872), SECTION 11.	70
-----: See PUNJAB LAWS (ACT IV OF 1872), SECTIONS 12, 15.	109
-----See PUNJAB PRE-EMPTION ACT (II OF 1905, LOCAL), SECTIONS 12, 13 (2).	195

-----*Transfer by vendee before suit for pre-emption is filed—Right of pre-emptor, who has obtained decree against vendee alone, to sue transferee—Limitation Act (XV of 1877, Schedule II, Article 10.*

The vendee exchanged some of the land purchased by him with the land belonging to the present defendants. Subsequently the plaintiff obtained a decree against the vendee alone, by right of pre-emption, for possession of the land purchased by him. Not being able to obtain possession of the land transferred by the vendee to the present defendants, the plaintiff filed the present suit against them.

Held, that the suit must be regarded as one for pre-emption, and not having been filed within the period of limitation prescribed therefor must be dismissed as barred by limitation.

ROUSHAN v. MAKHAN. 75

-----*Act (II of 1905, Local), Section 22—Purchase money—Market value—Good faith.*

Held, that a person who, in his anxiety to purchase a particular plot of land or to purchase land in a particular village gives a fancy price is acting in "good faith" within the terms of Section 22 of the Pre-emption Act, II of 1905, although his intention is to render it practically impossible for any one with a superior right of pre-emption to oust him.

Held, also, that an owner is not deprived by the Pre-emption Act of the privilege of selling for the highest price offered. 75 P. R., 1901; s. c., 123, P. L. R., referred to.

NIADAR MAL v. MUKH RAM. 106

PRE-EMPTION SUIT.—*See* LIMITATION ACT (XV OF 1877),
SCHEDULE II ARTICLE 10. 63

————— : *See* PUNJAB COURTS ACT (XVIII OF
1884) AS AMENDED, SECTION 39. 215

————— *See* PUNJAB PRE-EMPTION ACT (II OF
1905, LOCAL), SECTION 11. 174

————— : *See* SUITS VALUATION ACT (VII OF 1887).
146 (F. B.), 172

————— *Limitation—Punjab Pre-emption Act (II
of 1905), (Local), Sections 28, 29. Applicability of—*

Section 28 of the Punjab Pre-emption Act is intended to provide a period of at least one year for all persons who had the right to sue at the commencement of the Act and Section 29 provides for the period of limitation in all cases in which the right to sue accrues after the commencement of the Act.

And a suit for pre-emption is none the less governed by section 28 of the Act when under the new Act the plaintiff is relieved of the burden of proving a custom to maintain his suit which he had to substantiate to obtain a decree under the old law.

THAKARIA v. DYA RAM. 135

————— *Rival plaintiffs—Sale to one of them
having superior right—Lis pendens.*

Where several pre-emptors bring suits against the vendee and land is transferred to one of the plaintiffs whose right of pre-emption is superior to that of other plaintiffs, the transfer is not bad and the doctrine of *lis pendens* does not apply to such cases.

MAHMUD KHAN v. KHUDA BAKHSI. 145

————— *Vendee owning land under a prior sale—
Loss of the land under a pre-emption decree passed
subsequently to institution of the suit.*

Since the institution of the plaintiff's suit for pre-emption the vendees lost, under a pre-emption decree, the land which they had held in the village as purchasers under a prior sale, and which they claimed gave them pre-emption right equal to the plaintiff.

Held, that the effect of the decree was that the vendees could not be recognized as holding land on the date of the sale in dispute in the present case and the plaintiff's suit must be decreed. 46 P. R.,

1902; s. c., 49 P. L. R., 1902, 93 P. R. 1902; 44 P. R., 1903; s. c., 75 P. L. R., 1903, 30 P. R., 1903, *note, referred to.*

KEHAR SINGH v. MAHMAN SINGH. 128

PRE-EMPTOR HAVING RIGHT EQUAL TO SOME OF THE VENDEES AND SUPERIOR TO OTHERS: *See* CUSTOM—PRE-EMPTION. 81

PRESUMPTION—*See* CUSTOM—PRE-EMPTION. 175

————— : *See* CUSTOM—SUCCESSION. 209

————— : *See* MUTATION PROCEEDINGS. 200

————— AS TO REGULARITY OF NOTICE : *See* REGULATION XVII OF 1806, SECTION 8. 192

PROBATE—*Bequest of life-interest—Legatee not entitled to probate—Amendment of application for probate to include prayer for letters of administration not allowed.*

Where a Hindu testator bequeathed life-interests in the income of certain specified properties in favour of his widows, and the remaining property in favour of his son and one of the widows obtained a probate in respect of the property whose income was bequeathed to her—

Held, that the widow not being mentioned in the will, as executrix, either expressly or impliedly, was not entitled to the probate.

Held, also, that as the son had a preferable right to be appointed administrator of the estate, amendment of the application for probate could not be allowed to include a prayer for grant of letters of administration with a copy of the will.

MEHAR CHAND v. Mussammat LACHMI. 73

————— AND ADMINISTRATION ACT (V OF 1881), SECTION 55: *See* CIVIL PROCEDURE CODE (ACT XIV 1882), SECTION 503. 185

PROOF—BENEFIT OF DOUBT—*See* PENAL CODE (ACT XLV OF 1860), SECTIONS 304, 323. 77

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCHEDULE II, ARTICLE 18: *See* JURISDICTION. 98

PUBLIC STREET—ENCROACHMENT ON PUBLIC STREET: *See*
PUNJAB MUNICIPAL ACT, SECTIONS 92, 95. 105

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900)—*Mortgage in favour of agriculturist benefiting mortgagor's creditors—Duty to enforce.*

Where the Divisional Judge refused to decree possession of mortgaged property in favor of the mortgagee who was not debarred from taking the mortgage by the provisions of the Punjab Alienation of Land Act and had agreed to pay previous debts of the mortgagor and gave reason that the Act cannot be permitted to be circumvented by rival money lenders.

Held, that the Divisional Judge was clearly wrong in refusing the decree on the ground stated by him.

JAHAN KHAN v. DALLA RAM. 48

Retrospective effect of—Vendor and purchaser—Sale—Time for delivery of possession.

The provisions of the Punjab Alienation of Land Act do not apply to transactions completed before the Act came into force, and a suit for possession of land is not barred by the Act when right to claim possession had accrued before the Act came into force.

When the sale-deed does not fix any time for delivering possession by the vendor to the vendee, in the absence of any special agreement, it may fairly be presumed that it was intended to deliver possession within reasonable time.

SUNDAR LAL v. RAM SINGH. 5

PUNJAB COURTS (ACT XVIII OF 1884), SECTION 39: *See* CIVIL
PROCEDURE CODE (ACT XIV OF 1882), SECTION 283. 212

as amended, Section 39
—Appeal—Valuation of suit—Pre-emption suit—Transfer of appeal.

In a suit for possession of land by right of pre-emption, in ascertaining the value for purposes of jurisdiction the Court has to look in the first place to the amount calculated on the basis of thirty times the revenue, and, in the second place, to the amount on

No.

the payment of which the pre-emptor is entitled under the decree to obtain possession of the land.

Held, that an appeal by a pre-emptor against a decree dismissing his suit for pre-emption of revenue paying land sold for more than Rs. 5,000, does not lie to the Chief Court, for the course of appeal in the first instance is determined by the value of land calculated on the basis of thirty times the revenue. In such case if the appeal is filed directly in the Chief Court, the Court will decline to order its transfer to its own file. 16 P. R., 1908 F. B., s.c., 146 P. L. R., 1908. F. B., 46 P. R., 1908, s.c., 172 P. L. R., 1908 referred to.

KIRPA RAM v. HIRA NAND. 215

PUNJAB COURTS ACT (XVIII OF 1884), Section 40 (1), as amended by Act XXV of 1899—*Further appeal—Valuation—Mortgage—Redemption suit.—Cost of repairs—Additional lien.*

In a suit for redemption on payment of Rs. 323, the Court of first instance found Rs. 1,168 due and made redemption conditional on payment of that sum. The Lower Appellate Court reduced the amount to Rs. 604.

Held, that the value of the property involved in the decree was over Rs. 1,000.

Held, further, that the amount decreed for repairs was as much part of the money payable before redemption as was the actual mortgage consideration due and was therefore involved in the decree.

Held, also that a document which merely provides that the amount advanced under it must be repaid when the mortgage is redeemed and which does not make payment a condition precedent to redemption does not create an additional lien on the property.

KISHEN CHAND v. TAJ DIN. 197

—Section 40 (1), as amended by Act XXV of 1899—*Further appeal—Valuation—Suit for possession—Defendant setting up mortgage.*

Held, that in a suit for possession of land the value of the suit must be taken on the case brought by the plaintiff irrespective of the pleas raised by defendant.

BUDH SINGH v. DEVA SINGH. 199

PUNJAB COURTS ACT (XVIII OF 1884), *Section 40 (1) (b) — Valuation of suit—Further appeal—Suit for declaration that alienation of land is not binding on the plaintiff after the alienor's death.*

Held, by the Full Bench, that for purposes of further appeal under section 40 (1) (b) of the Punjab Courts Act, the value of a suit for a declaration that an alienation of ancestral land assessed with revenue by a male proprietor is not binding on the plaintiff after the alienor's death is thirty times the revenue and not the amount of the consideration for the alienation.

JALLA v. GEHNA. 79 (F.B.)

Section 40 (1) (b) — Value of suit—Further appeal—Suit for declaration that plaintiff will not be bound by an alienation after alienor's death.

Held, that the value of a suit for a declaration that a mortgage of land assessed to revenue by a widow will not be binding on the plaintiff, reversioner, after the widow's death is thirty times the revenue and not the amount of the mortgage—145 P. R., 1892, followed.

HARI SINGH v. NIKA SINGH. 66

Sections 40, 70 (a) — Punjab Tenancy Act (XVI of 1887), Sections 116 (a), 117, 158 (2), XVIII—Jurisdiction of Civil and Revenue Courts—Suit for a declaration that an orchard on a portion of the village common land was planted by plaintiff alone at his own expense—"Land Suit"—Pleadings, construction of—Partition proceedings—Question of title—"Mode of making partition"—Appeal treated as revision.

Held, that in this country pleadings are not to be strictly construed by their very letter, and the Courts have to consider what is the real point at issue between the parties.

The plaintiff prayed that a declaratory decree may be passed in his favor against defendants to the effect that a certain land occupied by a garden solely belongs to plaintiff, because he planted the garden thereon and holds possession thereof. The object of obtaining this declaration was to induce the Revenue authorities, when partitioning the land, to allot this particular

area to him in accordance with the provisions of the *wajib-ul arz*.

Held, that upon proper construction the suit was not a "land suit," and the suit having been valued at Rs. 400 no further appeal lay.

The appeal was treated as a revision and it was held that the suit was cognizable by Revenue Courts only, for the dispute between the parties was essentially one as to the allotment of a particular land as such, and there was no question of title involved in the suit, and the suit was excluded from the cognizance of the Civil Courts by section 158 (2) clause XVIII of the Punjab Tenancy Act.

DEVI DYAL v. AHMAD KHAN. 91

PUNJAB COURTS (XVIII OF 1884), AS AMENDED, SECTION 70 (1) (a)—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 295.

119

SECTION 70 (1) (a)—*Revision—Civil cases—Material irregularity—Ignoring the effect of document—Wrong interpretation of document.*

Held, that though a wrong interpretation of a document does not amount to a material irregularity within the meaning of Section 70(1) (a) of the Punjab Courts Act justifying interference in revision by the Chief Court, yet where the Lower Court has completely ignored the terms of a document or has placed on them a perversely erroneous construction the Chief Court is fully justified in revising the judgment of the Lower Court.

GULLA SINGH v. SUNDER SINGH. 173

SECTION 70 1 (b)—*Revision—Civil cases—Question of law—Limitation not set up as defence—Omission to consider if the suit is barred by limitation—Material irregularity.*

Under section 4 of the Limitation Act a Court is bound to dismiss a suit if it is barred by limitation even when the bar is not set up as a defence, and the Court commits a material irregularity if it omits to consider whether the suit is barred or not under the provisions of the Limitation Act.

BHAG SINGH v. DHIRTA SINGH. 412

PUNJAB COURTS ACT (XVIII OF 1884), AS AMENDED, SECTION 70 (1) (b)—*Punjab Tenancy Act (XVI of 1887), Section 4 (1)—Revision—Civil cases—Land suit—Suit for possession of unculturable land outside abadi—Question as to jurisdiction—Power of Chief Court to revise findings of fact relating to question of jurisdiction.*

Held, that the Chief Court is competent in the exercise of its revisional powers in determining questions of jurisdiction of Lower Courts to consider findings of fact arrived at by the Lower Appellate Court.

Held, that a suit for possession of unculturable land outside the *abadi* of a village attached to a well and used for stacking *bkusa* and *khurli* is a "land suit."

GANDU SINGH v. NATHA SINGH 6

70 (1) (b)—*See* CUSTOM—PRE-EMPTION. 104

(iii): *See* CUSTOM—ALIENATION BY MALE PROPRIETOR. 203

PUNJAB GENERAL CLAUSES ACT (I OF 1898), SECTION 4
See PUNJAB PRE-EMPTION ACT (II OF 1905)
 SECTION 2 (3). 153

PUNJAB LAND ALIENATION ACT (I OF 1900), as amended by Act I of 1907—Section 21—*Decree passed in violation of the Act—Procedure.*

A decree for possession of land was passed in favour of plaintiffs without regard to the provisions of section 3 of the Punjab Land Alienation Act. In execution of the decree possession of the land was delivered to the plaintiffs.

The plaintiffs sued again for possession alleging a subsequent ouster from the land by the defendant. The decree passed in the former suit was treated as a nullity and the suit was dismissed.

Held, that the fact that the decree was passed in violation of the terms of the Punjab Land Alienation Act did not render it a nullity. The decree was open to appeal or revision and unless set aside could not be treated as a nullity.

No.

Held, also, that the defect noticed in the case was provided for by section 9 of Act I of 1907, amending the Punjab Land Alienation Act, that the proper course to be adopted in such a case is to bring the former decree to the notice of the Deputy Commissioner and await for the prescribed two months any action taken by him under section 21 A of the Act. If he takes action the course of the suit should be determined by any alteration made in the decree.

If he takes no action, the suit must be disposed of on the understanding that the decree is a valid one.

DARYA DITTA v. MANA SINGH. 219

PUNJAB LAND REVENUE ACT (XVII OF 1887), SECTION 28, *Rules under—Rule No. 166—Zaildar. Appointment of—Discretion of Commissioner—Interference by Financial Commissioner.*

In deciding an appeal in a *Zaildari* case the duty of the Financial Commissioner is that the decision made by the Commissioner should be upheld unless the man he has chosen is either unfit, or for some good reason ineligible, or is manifestly very inferior to his rival.

MUHAMMAD MURAD v. SARDAR BAKHSH. 84

SECTION 44 :

See CUSTOM—SUCCESSION. 209

PUNJAB LAWS ACT (IV OF 1872), SECTION 11—*Custom—Pre-emption—Towns—Agricultural land—Pre-emption on the ground of vicinage—Amritsar city.*

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that the custom of pre-emption on the ground of vicinage existed in respect of sales of agricultural land situate in the Civil Station of Amritsar city.

ISHWAR DAS v. DUNI CHAND. 70

Sections 12, 15,—*Pre-emption—Compound interest on money awarded to vendee—Plaintiff claiming for benefit of another—Burden of proof—"Land"—Vendee owning small bit of cultivable land used as building site.*

Held, that the defendant, on whom the *onus* lay, had failed to show that plaintiff did not file the suit for pre-emption for his own benefit, but for the pleader

engaged in the case, who it was shown was a personal friend of the plaintiff and had apparently taken extreme personal interest in the matter of the claim.

Held, also, that a small bit of land, at one time agricultural and assessed with revenue of 9 pies, purchased by the vendees after it had been built over could not be considered as "land" conferring the right of pre-emption on the vendees. 7 P. R., 1896, 153 P. R., 1888, 96 P. R., 1898, *referred to*.

Held, also, that under Section 15 of the Punjab Laws Act, compound interest may be allowed to the vendee.

SHAM SUNDAR v. SODHI HARBANS SINGH. 109

PUNJAB LAWS ACT (IV OF 1872), SECTION 45: *See* REVISION—CRIMINAL CASES. 42

PUNJAB MUNICIPAL ACT (XX OF 1891), Sections 92 and 94—*Erection of partition wall over tharra.*

Held, that under Section 92 of the Punjab Municipal Act a person must obtain sanction of the Municipality before he can erect a new partition wall over the *tharra* of his building.

BASANT RAM v. KING EMPEROR. 36

Municipality—Sanction to erect building—Encroachment on public street.

Section 92 of the Punjab Municipal Act, 1891, applies primarily to the erection of buildings upon private property. An implied sanction for six weeks of inaction can only affect matters within the purview of section 92 of the Act and does not allow an encroachment or projection upon a public street without written permission of the Municipality under section 95. In case of any such encroachment or projection without written permission the Municipality may order demolition of structure on the street, and is not required to proceed by regular suit.

THE MUNICIPAL COMMITTEE OF DELHI v. DEVI SAHAI. 105

PUNJAB MUNICIPAL ACT (XX OF 1891), SECTION 120 E, as amended by Punjab Act (III of 1900)—*Municipality. Injunction issued by—Jurisdiction of Civil Court.*

Held, that although the Civil Courts should not interfere, save on good and substantial grounds, with the orders of local bodies passed in the *bona fide* exercise of the discretionary powers conferred upon them by the Legislature, the Chief Court is bound to see whether the discretionary powers vested in local authorities have been in any particular case exercised *bona fide* and reasonably. But before a Court is justified in interfering, it must find that the order in question was given *mala fide*, or that it was *ultra vires* or oppressive, wanton or altogether unreasonable.

The Chief Court on revision granted an injunction against the defendant Municipality, restraining it from enforcing an order issued to the plaintiff to close a drain which had existed for 25 years, when it appeared that the order was altogether unreasonable and inequitable:

GHULAM MUHAMMAD v. JANG BAZ. 196

PUNJAB PRE-EMPTION ACT (II OF 1905). *Retrospective effect of—*

Held, that the Punjab Pre-emption Act has retrospective effect. Section 2 (3) of the Act specifically deals with vested rights and has deprived parties of the right to pre-empt as stated therein.

BAHADUR v. ALIA. 19

_____, Section 2 (3). *Retrospective effect of—Punjab General Clauses Act (I of 1898), Section 4—Vendee having superior right under Punjab Laws Act at the time of sale to plaintiff who is given better right by Punjab Pre-emption Act.*

Held, by the Full Bench, that when the vendee had a superior right of pre-emption under the Punjab Laws Act, 1872 to the plaintiff claiming pre-emption, the saving clause of Section 2 (3) of the Punjab Pre-

emption Act, 1905, protects him as against that plaintiff, even if the plaintiff has superior rights under the Act of 1905.

Per Clark, C. J., and Reid, J., (Johnstone, J. dissentiente.)—That the priorities given by Section 12 of the Punjab Pre-emption Act, 1905, are applicable to a claim to the right of pre-emption with reference to a sale executed before the passing of that Act. *Abas Ali Shah v. Sher Zaman*, 22 P. R. 1908, S. C., 122 P. L. R., 1908 doubted by Johnstone, J.

The vendee who was first cousin of the vendor, a *Mahajan*, was a joint co-sharer with the vendor in the *Khata*, and the plaintiff, who was *Jat* agriculturist, was occupancy tenant of a part of the land in suit. The sale was effected before, and the suit was instituted after, the Pre-emption Act, 1905, came into force.

Held, that the suit must be dismissed.

SURTA v. FATEH CHAND. 153 (F.B.)

PUNJAB PRE-EMPTION ACT (II of 1905, LOCAL), SECTIONS 3 (1), 4, 5, 11, 12, 29, (c)—*Sale by a person who is not member of an agricultural tribe—Right of proprietor in the village.*

The plaintiff, a member of an agricultural tribe, sued for pre-emption on a sale of certain land by a person who was not a member of an agricultural tribe to a vendee who was a proprietor in the village but did not come within the purview of the proviso to Section 11 of the Punjab Act, II of 1905.

Held, that the plaintiff having a better right the claim was valid.

THAKAR DAS v. SOHAWA SINGH. 123

Section 3 (4)—*Member of an agricultural tribe—Mahtams of Muzaffargarh District.*

Held, that *Mahtams* in the Muzaffargarh District do not belong to an agricultural tribe for the purposes of Pre-emption Act.

SONUN v. RUPAN BAI. 143

PUNJAB PRE-EMPTION ACT (II OF 1905), (LOCAL), SECTION 11
—Pre-emption—Rights of members of vendor's tribe and other agriculturists.

Held, that under Section 11 of the Punjab Pre-emption Act a member of the vendor's tribe has a superior right of pre-emption to that of an agriculturist, as defined in Section 2 of the Punjab Alienation of Land Act.

MAHMUD *v.* NUR AHMAD. 174

—, Sections 12
 (a), 14—*Pre-emption—Right of heirs—Sale to collateral—Vendee and pre-emptor equally related to vendor—Presence of nearer heirs.*

When a sale of land is made to a collateral who is related to the vendor in the same degree as is the plaintiff, the suit must be dismissed though there may be nearer heirs of the vendor living at the time of sale, for clause (a) of Section 12 of the Punjab Pre-emption Act confers the pre-emption on the whole line of heirs and not merely on the next and nearest heirs at the time of sale, it being further provided that the right *inter se* would be determined by the order of succession, that is, the nearer heir would exclude the more remote and Section 14 of the Act does not apply when the plaintiff has no preferential right of purchase as against the vendee.

JANG BAHADUR KHAN *v.* KARAM KHAN. 144

—, Sections 12,
 13 (2)—*Custom—Pre-emption—Shops in villages.*

Subject to the provisions of section 12 of the Punjab Pre-emption Act the custom of pre-emption exists in respect of sales of shops in villages, and section 13 (2) of the Punjab Pre-emption Act does not apply to them.

KIRPA RAM *v.* KHUSHALI MAL. 195

—, Section 14—*Custom—Pre-emption—Joint holding—Sale to co sharer—Right of other co-sharers.*

A co-sharer in a joint holding has no right to pre-empt when the vendor has sold his share in the holding to a person who has also a share in it. Section

14 of the Punjab Pre-emption Act does not provide for the case of a pre-emptor claiming against a vendee who has equal right with him.

KHAN ZAMAN v. FATTEH SHER. 183

PUNJAB PRE-EMPTION ACT (II OF 1905), LOCAL, SECTIONS 28,
29—*Pre-emption—Limitation—Claim as collateral and co-sharer.*

The plaintiff brought his suit for possession of land by right of pre-emption on the 6th January 1906, in respect of a sale held on the 7th January 1901. The mutation of names had taken place on the 31st December 1901. It was alleged that the plaintiff was a co-sharer with his father, who was still alive, the father having given him a third of his holding, and that the plaintiff as son of his father was a collateral of the vendor under Pre-emption Act, II of 1905.

Held, that Pre-emption Act II of 1905 was applicable to the case and that as mutation of names had taken place in 1901 the claim was barred under Section 29 of the Act, as far as regards his claim based on Section 12 of the Act as a collateral of the vendor, but that as regards his claim as a co-sharer, the claim was based under the old Act, and his right, if any, accrued to him under that Act, and under Section 28 of the Act of 1905 plaintiff had a year from the commencement of the Act, 11th May 1905, within which he could sue.

ABAS ALI SHAH v. SHER ZAMAN. 122

Section 28,
29—*See PRE-EMPTION ACT.* 135

PUNJAB TENANCY ACT (XVI OF 1887), SECTION 4 (1): *See*
PUNJAB COURTS ACT (XVIII OF 1884), AS AMENDED,
SECTION 70 (1) (b). 6

Section 5 (1) (b)—
Landlord and tenant—Occupancy rights—Shamilat deh—Muafi—Resumption of—Status of owners of land in possession as tenants.

When land, the revenue of which has been assigned, is on resumption settled with the *muafidar's* heir, he is ordinarily entitled to receive the landlord's profits in the land, and to eject the tenants unless they can prove that they have acquired a right of occupancy. The

No.

mere facts that the land is land owned in common by the whole village and that some members of the proprietary body are the cultivators of the land do not give these cultivators a right of occupancy.

KARTAR SINGH v. PURAN. 180

PUNJAB TENANCY ACT (XVI OF 1887), Sections 8, 59—Act III of 1893, Section 4—Statement of conditions of grant of land on Chenab Canal Colony—Occupancy rights—Succession.

Held, that there is no reason to hold that the use of the words "heirs and legal representatives" in clause 21 of the statement of the conditions on which Government is willing to grant to a tenant of the peasant class lands situate on the Chenab Canal under Section 4, Act III of 1893, is not limited by Section 59 of the Tenancy Act. Section 8 of that Act contemplates the creation of occupancy rights by means other than those provided by Sections 5 and 6 of the Act, and tenancies created by Act III of 1893 are governed by the rules contained in the Tenancy Act.

SAHIBZADA v. JAWAYA. 107

77 (2) (u)—See JURISDICTION OF CIVIL AND REVENUE COURTS.

114

Sections 53 and 60—Landlord and Tenant—Occupancy rights. Alienation of—Acquiescence of landlord—Omission to sue for cancelment of alienation.

Held, that from mere omission on the part of the landlord to sue for 15 months for cancelment of alienation of occupancy rights his acquiescence in the alienation cannot be inferred.

MOHAR SINGH v. JHANDA. 44

Section 59—Landlord and Tenant—Occupancy rights. Alienation of—Right of reversioner to object—Custom—Burden of proof.

When a collateral seeks to restrain an alienation of any occupancy right by an occupancy tenant, proof that such a power of restriction exists in respect of proprietary rights would be relevant.

When such a suit is brought, the initial *onus* lies on the plaintiff, but when he has proved first, that he is

entitled to succeed to occupancy right on the death of the occupancy tenant, and second, that had the subject-matter in question been a proprietary right instead of a right of occupancy, he could have maintained the suit, the *onus* will be shifted and it will be upon the person who asserts that no such custom obtains as to occupancy rights to prove that contention.

ABDULLA v. ALLAH DAD. 18 (F.R.)

PUNJAB TENANCY ACT (XVI OF 1887), *Section 59—Landlord and Tenant—Occupancy rights—Custom—Succession—Collaterals—Sonless adopted son's associated brother.*

On the death of an adopted son the brothers of his adoptive father succeed to occupancy rights originally held by their common ancestor and inherited by the adopted son from his adoptive father, and natural brothers and nephews of the adopted son associated by him in cultivation have no right to succeed.

SAIDA v. ISMAIL. 32

—————*Sections 59, 111, 112*
Landlord and tenant—Occupancy rights—Succession—Wajib-ul-arz. Effect of entry in—

Held, that the provisions of Sections 111 and 112 of the Punjab Tenancy Act override Section 59 of the Act, and an entry in a *Wajib-ul-arz* prior to 1871 with respect to the succession to land in which a right of occupancy exists has the force of an agreement.

Parties can by written agreement settle on a law of succession different from the succession prescribed in the Act.

PURAN v. MAMUN. 76

—————SECTION S. 77 (3) *d*), 100: *See* PUNJAB TENANCY ACT, SECTION 77 (3) (*d*). 26

—————*Section 77 (3) (d)—Jurisdiction of Civil and Revenue Courts—Suit for declaration of Mokarraridari rights.*

Held, that a suit for declaration of *Mokarraridari* rights is cognizable by a Civil Court and not by a Revenue Court.

NAWAB KHAN v. SEWA DAS. 187

PUNJAB TENANCY ACT (XVI OF 1887), *Section 77 (3) (d) and 100—Jurisdiction of Civil and Revenue Courts—Suit for compensation for branches of trees cut by defendant—Allegations in plaint.*

It is sett'ed law that ordinarily the question of jurisdiction is determined by the plaint and the allegations of plaintiff, and the pleas of defendant are immaterial.

The plaintiff sued for compensation for value of branches of a tree cut by the defendants. The defendants pleaded that as occupancy tenants they were entitled to cut the branches. The *Munsif* found the plea of the defendants not established. On appeal the District Judge made a reference to the Chief Court for the decree in the case to be registered as a decree of the Revenue Court.

Held, that the suit not being cognizable by the Revenue Court, the decree could not be registered as a decree of the Revenue Court.

FAKIRIA v. DHANI NATH. 26

_____, SECTION 77 (3) (j).—
See JURISDICTION OF CIVIL AND REVENUE COURTS. 171 (F.B.)

_____, Section 77 (3) (j).—
Jurisdiction of Civil and Revenue Courts—Suit by a chamar for recovery of haq sep.

Held, that a suit by a *chamar* for the recovery of *haq sep* due to him under the terms of the *Wajib-ul-ars* of the village is cognizable by a Civil Court.

GUJAR v. DULA. 178

_____, Sections 77 (3) (i) and 100—*Jurisdiction of Civil and Revenue Courts—Kudhi kamini. Suit for recovery of—Suit triable by Revenue Court tried by Small Cause Court—Decree cannot be registered under Section 100, Tenancy Act.*

Held, that *kudhi kamini* (hearth cess) is a village cess within the meaning of Section 77 (3) (j) of the Punjab Tenancy Act; and that a suit for recovery of such dues is excluded from the jurisdiction of the Civil Courts.

When a suit triable by a Revenue Court has been tried by a Small Cause Court; the decree passed in the suit cannot be registered under Section 100 of the Punjab Tenancy Act.

RAJ SARUP v. HARDAWARI. 120

PUNJAB TENANCY ACT (XVI OF 1887), *Section 77 (3) (n)—Jurisdiction of Civil and Revenue Courts—Suit on bond executed for arrears of rent.*

A suit for recovery of money due on a bond the consideration for which is arrears of rent is cognizable by Civil Court and not by Revenue Court.

AMRIT LAL v. BHAGWANA. 80

Section 100—*Jurisdiction of Civil and Revenue Courts—Reference to Chief Court—No mistake as to jurisdiction.*

When a claim triable by a Revenue Court is heard and dismissed by a competent Revenue Court, the Chief Court is not competent to entertain a reference made under section 100 of the Punjab Tenancy Act by the Appellate Court, on the ground that on the facts as proved the plaintiff could have brought a suit on a different cause of action which would be cognizable by a Civil Court, for there is no mistake as to jurisdiction in such a case.

KALU v. PARTA MAL. 202

SECTIONS 116 (a), 117, 158 (a) XVIII: *See PUNJAB COURTS ACT (XVIII OF 1884), SECTIONS 40, 70 (1) (a).* 91

Q.

QUESTION OF LAW: *See PUNJAB COURTS ACT (XVIII OF 1884) SECTION 70 (1) (b).* 142

See REVISION—CIVIL CASES. 100

QUESTION OF TITLE: *See PUNJAB COURTS ACT (XVIII OF 1884), SECTIONS 40, 70 (a).* 91

R.

RAILWAYS ACT (IX OF 1890), *Sections 72 and 75 (1)—Railway—Declaration of contents of box containing currency notes, ornaments, etc.—Claim for compensation does not lie when no declaration made in respect of box booked by luggage-van—Cause of action.*

No.

Held, that when a passenger has booked, by Railway luggage-van, a box containing silver and gold ornaments, currency notes and other articles, without making a declaration, as required by section 75 of the Indian Railways Act and the box is lost, no suit for compensation against the Railway is maintainable.

AIWAZ v. SIMLA-KALKA RAILWAY COMPANY. 15

RECEIVER, WHEN MAY BE APPOINTED: *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 503. 185

REFERENCE TO CHIEF COURT: *See* PUNJAB TENANCY ACT (XVI OF 1887), SECTION 100. 202

REFORMATORY SCHOOLS ACT (VIII OF 1897), SECTION 16: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTIONS 367, 424. 55

REGISTRATION ACT (III OF 1877), SECTION 17, CLAUSE (i): *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTIONS 520, 525, 526. 184

See JURISDICTION OF CIVIL AND REVENUE COURTS. (d). 189
at page 609

REGISTRATION—SALE OF IMMOVABLE PROPERTY BY REGISTERED DEED, VENDEE HAVING NOTION OF A PREVIOUS AGREEMENT TO SELL MADE BY VENDOR WITH ANOTHER PERSON: *See* SPECIFIC RELIEF ACT (I OF 1877), SECTIONS 20, G. 27 (b). 97

REGULATION XVII OF 1806, SECTION 7: *See* VALUATION OF SUIT. 141

Section 8—Mortgage by way of conditional sale—Condition as to payment of mortgage-money by instalments and mortgage operating as sale in default of payment—"Stipulated period."

Where the mortgagor agrees to pay mortgage-money by instalments, and it is stipulated that in default of payment of any instalment the mortgage shall operate as a sale, the mortgage is not one by way of conditional sale, and the provisions of the Regulation XVII of 1806 are not applicable to it.

A mortgage cannot be foreclosed before the expiry of the full term of the mortgage when mortgage-money is payable by instalments, and default is made in payment, and it is provided in the mortgage-deed that the mortgage will operate as sale in case of default in payment.

HAR GOPAL v. BHAGWAN SAHAI. 38

Section 8—Mortgage by way of conditional sale—Foreclosure proceedings—No pre-

sumption as to regularity of notice—File of foreclosure proceedings containing notice destroyed.

When the file of foreclosure proceedings containing notice issued to the mortgagor under section 8 of Regulation XVII of 1806 is destroyed, it cannot be presumed that a valid notice had been issued, and the requirements of the Regulation complied with, the facts that a notice had been ordered by the District Court to be issued to the mortgagor, and that on the mortgagor attending the Court he was warned that unless he paid the mortgage-money within one year, no excuse would be listened to afterwards were not sufficient to excuse strict proof of the compliance of the requirements of the Regulation.

SOCHEET SINGH v. DIAL SINGH. 192

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), SECTIONS 14 AND 18: *See* RELIGIOUS INSTITUTION. 176

RELIGIOUS INSTITUTION: *See* CIVIL PROCEDURE CODE, SECTION 44. 102 (F. B.)

—————: *See* CIVIL PROCEDURE CODE, (ACT XIV OF 1882), SECTION 539. 193

————— — *Manager. Appointment and dismissal of—Jurisdiction of Civil Court—Religious Endowments Act (XX of 1863), Sections 14, 18—Civil Procedure Code, (Act XIV of 1882), Section 539—Sanction of Collector when necessary.*

No previous sanction is necessary to bring a suit by the Manager of a religious institution for his re-instatement. 122 P. R., 1890 *followed*.

So far as the *muafi* grant is concerned, the executive authorities have the right of superseding a *muafidar* for improper application of the funds entrusted to him and in that case they have the sole responsibility for appointment of his successor within the conditions of the original grant.

Previous sanction either under Sections 14 and 18 of Act XX of 1863 or Section 539 of Civil Procedure Code is necessary before suit can be filed for the removal of the Manager of a religious institution. It is not open to a self constituted Committee in the event of dispute with the Manager to take the matter into their own hands, and if they do so, they run the risk of a successful suit by the ex-manager for re-instatement.

In each particular case it has to be considered whether the previous sanction for a suit should be

obtained under Act XX of 1863 or under Section 539 of the Civil Procedure Code.

Bengal Regulation XIX of 1810 was made applicable to Punjab by Act XX of 1863. 95 P. R., 1900 s. c., 6 P. L. R., 1901, *referred to*.

BANSI DHAR v. CHHANGA RAM. 176

RELIGIOUS INSTITUTION—*Dera Guru Nanak Sar in village Takhatpura, Ferozepur District—Mahant—Removal of—Powers of villagers.*

Held, that the village proprietary body had failed to prove that by custom they had a right to remove for misconduct the Mahant of Dera Guru Nanak Sar in village Takhatpura of Ferozepur District, and that no misconduct justifying the removal of the defendant from mahantship was established.

BHAGWAN DAS v. HARDIT SINGH. 108

REMAND—: *See* CIVIL PROCEDURE CODE, SECTION 562,
34, 96, (F.B.) 161, 177

RES-JUDICATA : *See* CIVIL PROCEDURE CODE, SECTION 13.
65, 95, 164, (F. B.) 198.

—————: *See* CUSTOM—ALIENATION BY SONLESS
PROPRIETOR. 111

—————*See* JURISDICTION OF CIVIL AND REVENUE
COURTS. 124

RESTITUTION : *See* CIVIL PROCEDURE CODE, SECTION 244. 23

————— OF CONJUGAL RIGHTS: *See* CUSTOM—MARRIAGE. 152

RETROSPECTIVE EFFECT OF ACTS : *See* PUNJAB PRE-EMPTION
ACT (II OF 1905), SECTION 2 (3). 153 (F.B.)

REVIEW—*See* ACT XIX OF 1841, SECTIONS 1, 3 AND 4 116

—————PROPRIETY OF RE-OPENING QUESTIONS ALREADY
DECIDED : *See* PRACTICE. 41

REVIEW NOT NECESSARY TO CORRECT CLERICAL ERRORS IN
JUDGMENT—: *See* CIVIL PROCEDURE CODE (ACT XIV OF
1882) SECTIONS 202, 623. 40

REVISION—CIVIL CASES : *See* REVIEW—ACT XIX OF 1841
SECTIONS 1, 3 AND 4. 116

REVISION—CIVIL CASES : *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 295. 119

————— *See* CUSTOM—ALIENATION BY MALE PROPRIETOR. 203

————— *See* CUSTOM—PRE-EMPTION. 104

————— *See* PUNJAB COURTS ACT (XVIII OF 1884, AS AMENDED), SECTION 70 (1) (a). 91, 173

————— *See* PUNJAB COURTS ACT (XVIII OF 1884), SECTION 70 (1), (b). 142

————— *See* PUNJAB COURTS ACT (XVIII OF 1884), AS AMENDED SECTION 70 (1) (b). 6

————— QUANTUM of evidence—*Question of fact.*

The Chief Court will generally refuse to exercise its powers of revision in civil cases on questions of fact when there is evidence on record which the Lower Court has considered. It cannot be said that the Lower Appellate Court has committed a material irregularity merely because it may possibly have come to a wrong conclusion in weighing the evidence —*P. R.*, 9 of 1894 *followed*.

AYA RAM v. KARM NARAIN. 208

————— *Question of law—Acquiescence—Alienation by sonless proprietor.*

Held, that the question of acquiescence in an alienation by a sonless proprietor is a question of law within the meaning of Section 70 (1) (b) of the Punjab Courts Act.

A sonless proprietor made a gift of his land. Excepting some 17 *kanals* the whole of the gifted land was in the possession of a mortgagee from the proprietor. Mutation took place about a year after the transfer, but the proprietor remained in possession of the 17 *kanals* he had held with him and no steps were ever taken by the donee to redeem the mortgage. In 1891 the donor died and the donee took possession of the 17 *kanals* of land. About a year after the death of the donor the reversioners sued to enforce their right to succeed to the land, and contested the gift. It

was objected that the reversioners had acquiesced in the gift and their suit did not lie.

Held, that the contention was not valid and no acquiescence was proved.

SHAIR SINGH v. SIDHU. 100

REVISION—CRIMINAL CASES : See CRIMINAL PROCEDURE CODE,
SECTIONS 145 AND 439. 71

—————See CRIMINAL PROCEDURE CODE
(ACT V OF 1898), SECTIONS 196, 537. 149

—————*Acquittal*.

It is very rarely correct to interfere in revision with an acquittal. The *P. R.* 18 of 1905 (*Cr.*) ; s. o., 81 *P. L. R.*, 1905, has been overruled.

MUNSHI v. THE CROWN. 72

—————*Acquittal on facts—Discretion—*
Expunging findings from judgment—Sanction to prose-
cute—Approver—Pardon. Withdrawal of—

Held, that the revisional powers of the Chief Court against orders of acquittal are not confined to points of law but extend in exceptional cases to questions of fact also, though the Court in doing so cannot then and there convict but can only order a new trial.

Held, also, that the Chief Court should revise orders of acquittal wherever justice requires that it should do so, the exercise of revisional jurisdiction is not affected by the fact that no appeal has been filed by Government against the order of acquittal.

The Chief Court under the peculiar circumstances of the case refused revision of the order of acquittal though ample grounds existed to set aside the order.

The order of prosecution of the approver for perjury was set aside as not warranted by the facts of the case.

The Chief Court held that the remarks of the Sessions Judge about a certain witness, the appover, and the police, were uncalled for and not justified by the materials on record.

VIRU MAL v. SADDU. 157

REVISION—CRIMINAL CASES—*Executive order—Criminal Procedure Code (Act V of 1898), Sections 202, 204, 439—Enquiry by Police by order of District Magistrate when case is being tried by a Subordinate Magistrate.*

In a case under Section 49 of the Excise Act, process was issued under Section 204 of the Criminal Procedure Code, and later on proceedings were taken under section 242 and Section 244 of the Code. The District Magistrate issued order to the Police to continue enquiry into the case. On revision it was contended on behalf of the District Magistrate that his order was not open to revision as he acted as head of the Excise Administration in the district.

Held, that the action of the District Magistrate was illegal and the Chief Court was competent to order enquiry to be dropped.

When an illegal order is passed and action taken, which involves matters coming within the purview of law and justice and within scope of the authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as judicial officer, more particularly when no authority other than as a judicial officer for his action is cited.

SHIV NATH v. THE CROWN. 86

—*Judicial proceeding—Punjab Laws Act (IV of 1872), Section 45—Vagrant—Order requiring foreign vagrants to leave district.*

Held, that an order passed under Section 45 of the Punjab Laws Act, requiring a band of foreign vagrants to leave a district being an executive order, is not open to revision by the Chief Court.

SUNDAR v. THE CROWN. 42

RIWAJ-I-AM—*See* CUSTOM.—ADOPTION. 184

—*See* CUSTOM.—HINDU LAW. 181

RULINGS OF CHIEF COURT—*Duty to follow—Limitation Act (XV of 1877), Schedule II, Article 179—Execution of decree—Limitation—Step in aid of execution—Application to withdraw money deposited by judgment-debtor.*

A Subordinate Court is bound to follow the rulings of the Chief Court, quite irrespective of any conflict of authority that there may be between those rulings and the decisions of the High Courts and of any views which the Court may entertain as to the equities of the case which it is dealing.

Held, by the Full Bench, that an application by the decree-holder to the executing Court for payment to him of money deposited in Court in partial satisfaction of the decree is not an application to take some step in aid of execution within the meaning of Article 179 (4) of the Limitation Act, 107 P.R., 1881, 88 P.R., 1884, 27 P.R. 1888, 18 P. R., 1904, 76 P.R., 1904, s.c., 132 P.L.R., 1904; I.L.R., VIII Cal., 890, X Cal. 549, XI Cal. 227, XXII Cal., 196, X W.N. Cal., 28, followed. I.L.R., XI Mad., 174, XVI Mad., 452, XVII Mad., 165, XXII Bom., 310, VI All., 366, XII All., 399, dissented from.

KASU v. ATAR SINGH. 207 (F.B.)

S.

SALE IN OVERT MARKET: *See* CONTRACT ACT (IX OF 1872), SECTION 108. 140

SANCTION TO ERECT BUILDING: *See* PUNJAB MUNICIPAL ACT, SECTIONS 92, 95. 105

SANCTION TO PROSECUTE: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTION 195. 103 (F.B.), 211

————— : *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTIONS, 196, 537. 149

————— *See* REVISION—CRIMINAL CASES. 157
SECONDARY EVIDENCE: *See* WILL. 204

SENTENCE—*See* PENAL CODE (ACT XLV OF 1860), SECTION 62. 147

SET-OFF: *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 111. 130

	No.
<i>Sharik Shikmi</i> : See CUSTOM—PRE-EMPTION.	175
SMALL CAUSE: See JURISDICTION.	98
SPECIFIC PERFORMANCE: See SPECIFIC RELIEF ACT (I OF 1877), SECTIONS 20, 27 (b).	97

SPECIFIC RELIEF ACT (I OF 1877), Sections 20, 27 (b)—Specific performance—Sale of immovable property by registered deed, vendee having notice of a previous agreement to sell made by vendor with another person—Compensation for breach of agreement.

When a person buys immovable property by a registered conveyance having notice of a previous agreement to sell made by the vendor with another person, the vendee has no right to the property as against that person, and cannot urge in defence to a suit for specific performance of the agreement that his sale deed is registered and that the agreement to sell contains a condition under which the vendor makes himself liable for compensation if possession could not be delivered. *P. R* 31 of 1897, *I. L. R.*, VI Calcutta 534, X Calcutta 710, followed; *P. R.*, Nos. 2 and 90 of 1885 distinguished.

HUKAM CHAND v. NIKKA SINGH. 97

SECTION 42: See CIVIL
PROCEDURE CODE (ACT XIV OF 1882), SECTION 53. 58

Section 42—Declaratory
suit—Possession of plaintiff—Proof—Custom—Suc-
cession—Daughter—Collaterals in the seventh degree—
Onus probandi—Chohan Rajputs of Kharwan village,
Jagadhri Tahsil, Ambala District.

To a suit for a declaration of title to certain lands it was pleaded that the plaintiffs not being in possession, the suit was barred by Section 42 of the Specific Relief Act. Neither party had succeeded on the record to prove possession by affirmative evidence. The lands were held in actual possession by mortgagees and by tenants, and it was not clear whether plaintiff or the defendant had received rents from the tenants. The defendant relied on the mutation entry in her favor, and the plaintiffs on entries in the *girdawari* paper.

Held, that under the circumstances of the case the suit for a declaration was maintainable. *I. L. R.*, *XV Mad.*, 307, *followed*.

There is no authority for the assumption that in the absence of male issue and of a widow the general rule of succession is necessarily that of agnatic succession as against the daughters, however distant in degree the agnate might be and whatever might be the creed and tribe of the parties concerned.

Held, that by custom prevailing among *Chohan Raiputs* of Kharwan village,, *Tahsil Jagadhri* of Ambala District, daughters of a sonless proprietor have a preferable claim to his estate as against his collaterals in the seventh degree.

ABDUL KARIM v. SAHIB JAN. 99.

SPECIFIC RELIEF ACT (I OF 1877), *Section 42—Declaratory suit—Plaintiff's chance of succession to the property in suit very remote—Dismissal of suit.*

Where the plaintiff, whose claim of succession to the property in suit was a very remote one, sued to set aside a mortgage of the property and the suit was dismissed, the Chief Court declined to make an order of remand for further enquiry in the case.

TARA SINGH v. Mussammatt CHANDI. 51

SPLITTING OF CLAIM : *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 43. 93

STOLEN PROPERTY : *See* CONTRACT ACT (IX OF 1872), SECTION 108. 140

SUCCESSION : *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 13. 95

———— : *See* CUSTOM—HINDU LAW. 94, 167, 181

———— : *See* CUSTOM—SUCCESSION. 4, 20, 31, 67, 74, 156 (F.B.), 209, 217.

———— : *See* CUSTOM—MUHAMMADAN LAW. 154, 188, 206.

———— : *See* CUSTOM—MUHAMMADAN LAW. 206

———— : *See* PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 8, 59. 107

SUCCESSION: *See* PUNJAB TENANCY ACT (XVI OF 1887),
SECTION 59. 32, 76

-----: *See* SPECIFIC RELIEF ACT (I OF 1877),
SECTION 42. 99

-----RIGHT OF COLLATERALS OF ADOPTIVE
FATHER TO SUCCEED TO THE PROPERTY OF ADOPTED SON:
See HINDU LAW. 113

SUFFICIENT CAUSE: *See* CIVIL PROCEDURE CODE, 1882
SECTION 103. 33

SUITS VALUATION ACT (VII OF 1887), *Section 3—Jurisdiction of Civil Court—Valuation of suit—Pre-emption suit—Suit for possession of land assessed with land revenue—Definite portion of revenue paying khata.*

Held, that the value for purposes of jurisdiction of a suit for possession of land assessed with revenue where the land claimed is a definite portion of a revenue paying *khata*, is thirty times such portion of the revenue as may be rateably payable in respect of that portion.

FATTA v. KHAN BAHADUR. 172

-----SECTION 3 (1): *See*
COURT FEES ACT (VII OF 1870), SECTION 7 V (e). 61

-----*Pre-emption suit—Valuation of suit—Value of land—Consideration for sale exceeding pecuniary limits of jurisdiction of Court—Procedure.*

The plaintiff sued for possession of agricultural land. Thirty times the revenue payable on the land did not exceed pecuniary limits of the Court of *Munsif*, 1st Class, and it was instituted in his Court. The consideration expressed in the sale-deed was Rs. 5,000, and the Court, finding that the price was not fixed in good faith and that the market value was Rs. 4098, gave the plaintiff a decree for possession conditional on payment of that sum.

Held, by the Full Bench, that the *Munsif* being incompetent to pass a decree conditional upon payment of a sum which exceeded pecuniary limits of his jurisdiction, he should have returned the plaint to be presented to higher Court having jurisdiction to try the suit.

MUHAMMAD AFZAL KHAN v. NAND LAL. 146 (F.B.)

T.

TRANSFER OF APPEAL: *See* PUNJAB COURTS ACT (XVIII OF 1884) AS AMENDED, SECTION 39. 215

———— OF JUDGE: *See* PRACTICE.

TRUST—*See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 539. 193

U.

USER: *See* MUHAMMADAN LAW. 78

UNDUE INFLUENCE—*See* CONTRACT ACT (IX OF 1872), SECTION 16. 160

V.

VAGRANT: ORDER REQUIRING FOREIGN VAGRANTS TO LEAVE DISTRICT—: *See* REVISION—CRIMINAL CASES. 42

VALUATION OF SUIT: *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECTION 283. 212

————: *See* PUNJAB COURTS ACT (XVIII OF 1884) AS AMENDED, SECTION 39. 215

————: *See* PUNJAB COURTS ACT, SECTION 40. 66, 79, 197, 199

———— *See* SUITS VALUATION ACT (VII OF 1887). 146 (F.B.), 172

————— *Mortgage—Redemption suit—Value of mortgaged property—Regulation XVII of 1806, Section 7—Mortgage by way of conditional sale—Notice. Defects in—*

Held, that for purposes of Section 40 (b) of the Punjab Courts Act the value of a suit for redemption of a mortgage is the amount held by the Lower Court payable to the mortgagee and not the value of the mortgaged property.

Held, also, that under the Punjab Civil Code Section 14, clause 3, a suit for foreclosure was necessary before a mortgagee could become proprietor under a mortgage by way of conditional sale.

The omission in the notice of reference to Section 7 of the Regulation XVII of 1806 is fatal to the validity of the notice.

Mere offer to pay to the mortgagee the amount due by the mortgagor does not amount to a waiver of his right to take advantage of legal defects in the foreclosure proceedings.

A mortgagee in possession of the mortgaged property does not alter the nature of his possession by merely asserting that he is owner and not mortgagee of the property.

Quære—Whether cross-objection can be filed in an appeal admitted under Section 70 (1) (b) of the Punjab Courts Act.

BALWANT SINGH v. RAM DAS. 141

VENDOR AND PURCHASER: *See* PUNJAB ALIENATION OF LAND ACT (XIII OF 1900). 5

————— *Personal covenant—Indemnity against disturbance to vendee does not enure for the benefit of pre-emptor.*

A condition in the original deed of sale in which the vendor guarantees his title in the land solely to the original vendee, and in which he agrees to compensate that vendee if disturbed, is one which does not enure for the benefit of the pre-emptor who succeeds in obtaining a decree for possession by right of pre-emption.

SANDER KHAN v. BHANA. 57

W.

WAIVER: *See* CUSTOM—PRE-EMPTION. 39

———— OF PRIVILEGE: *See* CRIMINAL PROCEDURE (ACT V OF 1898) SECTION 454. 136

WAJIB-UL-ABZ—*See* CUSTOM—HINDU LAW. 158, 181

————— *See* CUSTOM—PRE-EMPTION 175

————— *See* PUNJAB TENANCY ACT (XVI OF 1887), SECTIONS 59, 111, 112. 76

————— CHAKWAR: *See* CUSTOM—PRE-EMPTION. 82

WAKF—*See* MUHAMMADAN LAW. 78

Wakf property—*Burden of proof—Takia-Kutab Garhi in Lahore.*

Held, that the plaintiff, on whom the burden of proof lay, had failed to prove that the Takia Kutab Garhi, situate in Lahore, is *wakf* property; that whatever the original history of the property might have been it had long since passed into private hands.

Mussammat ALAH JAWAI v. MUHAMMAD HASSAN. 110

WILL : *See* CUSTOM—HINDU LAW. 158

— : *See* CUSTOM—SUOCESSION. 4

— : *See* MUHAMMADAN LAW. 168

— : *See* PROBATE. 73

— IN FAVOR OF FEMALE : *See* HINDU LAW. 214

— *Revocation of—Registered will not found after death of testator—Evidence—Secondary evidence—Burden of proof.*

The plaintiff, a minor, claiming under a registered will of his grandfather, sued to set aside an alienation by his father of property included in the will. The original will was not forthcoming. A question arose whether a certified copy of the will was admissible in evidence.

Held, that as under the circumstances from the mere fact that the will was not forthcoming it could not be presumed that the will was revoked by the testator, certified copy of the will was admissible in evidence.

PURAN v. TONI. 204

WITHDRAWAL OF APPEAL : *See* LIMITATION ACT (XV OF 1877), SCHEDULE II, ARTICLE 179 (2). 87

Z.

ZAILDAR : *See* PUNJAB LAND REVENUE ACT (XVII OF 1887), SECTION 28—RULES UNDER— 84

— *Candidate belonging to the prevailing tribe in a zail.*

Where two or more candidates are equally qualified to be appointed as *saildars*, the one belonging to the tribe prevailing in the *zail* should be given preference.

JAFAR KHAN v. RAJA AZIMULLAH KHAN. 43

400

THE PUNJAB LAW REPORTER.

VOLUME IX.]

7TH JANUARY, 1908.

[No. 1.

THE JUDGE AS A POLITICAL FACTOR.

BY ANDREW ALEXANDER BRUCE.

By far the greater part of the law of both England and America is, and of necessity must be, judge and not legislature made. Paradoxical though it may seem, we are and must in the main be governed by our courts and not by our legislatures. The judge in the history of legal development antedated the legislature. The father despotically settled the quarrels of his children, the chief of his followers, the king of his subjects, and the judgments which they rendered and the customs which they recognized were crystallized into law, long before there was any organized system of legislation. The province of the legislature, indeed, is and always has been to supplement and to change, rather than to originate. The activities of the English parliament and of the American legislatures have of necessity been much more in the direction of correcting and modifying and expanding the already judge-made body of law than of building up any legal structures of their own. While through the many centuries of the growth of the English and American jurisprudence the legislatures and parliaments have met only for limited periods and at irregular intervals, the courts have been in almost continuous session and have been constantly called upon to lay down rules of practice and of conduct in matters concerning which the legislatures have not spoken. Not only this, but they have possessed the great prerogatives of construction and enforcement. Even in England, where parliament is supreme, a legislative body and a constitutional convention in one, and where the necessity of conforming to the requirements of a written constitution is not present, the legislative power which these prerogatives confer is fully recognized. "And be it finally enacted," protested a parliament of Henry the VIII,¹ "that the present act and every clause, article and sentence comprised in the same, shall be taken and accepted according to the plain words and sentences therein contained, and shall not be interpreted nor expounded by color of any pretence or cause or by any subtle argument or invention or reason to the hinderance, disturbance or derogation of this act or any part thereof." But it was within the power of the courts of that time and it is within that of the courts of to-day to sneer even at so plain a statutory provision, for without judicial sanction and enforcement an act of parliament is a nullity. In the United States

¹ 28 Henry VIII, ch. 7, Sec. 28.

the legislative power of the judiciary is even greater than it is in England. Our constitutions indeed, as construed by the courts, have made the American governments, both state and national, pre-eminently governments by the judiciaries, and this not only in matters which are political and governmental but in those which are social and industrial. When asked to set aside or to refuse to enforce an act of the Chamber of Deputies, the French judge will shrug his shoulders, "Qu'il faut," he will say, "does not the Chamber of Deputies understand the Constitution 'as well as we, and is it not equally bound to respect it? Shall we 'judges put ourselves above the legislature, above the representatives of 'of the people?'" And it would have certainly been within the power of the American judges to have yielded to this legislative discretion, and to have refrained from entering in any large degree into the industrial conflict. But Anglo-Saxons are not Frenchmen. It is not an Anglo-Saxon trait to hesitate at wielding the power with which one finds himself possessed nor to stretch out to gain more. Instead of refusing to interfere, the American courts, both state and national, have so construed the words "property" and "liberty" and the term "due process of law" which are found in the 14th Amendment to the Federal Constitution and in the constitutions of the several states as to subject not only the commercial and governmental but the entire industrial and social systems to their regulation and control. "Property," they maintain, in "its broader sense is not merely the physical thing which 'may be the subject of ownership, but is the right of dominion, possession 'and power of disposition which may be acquired over it, and the right of 'property guaranteed by the Constitution is the right not only to possess 'and enjoy it but also acquire it in any lawful mode or by following any 'lawful industrial pursuit which the citizen in the exercise of the liberty 'guaranteed him chooses to adopt." The term "liberty," as used in the Constitution, they say, means not only freedom of the citizen from servitude and restraint but the right to be free in the use of his powers and intellect and to adopt and pursue such vocations and callings as he may choose, subject only to the restraints necessary to secure the common welfare."¹ And above all they insist that it is for the courts and not for the legislatures to determine and to decide what restraints are necessary to secure this public welfare and what are not. The exigency for any measure they say is for the legislature to pass upon but the necessity therefor and the reasonableness is for the courts. They in short assume to themselves the right to decide where collectivism shall begin and where individualism shall end, and to control and direct the great social and political movements of the time.

Even the Supreme Court of the United States, though for a time evidencing an intention to yield to the discretion of the state legislatures and of the state courts in matters of local, industrial, and personal concern,² has recently shown a determination to itself supervise the police legislation of the states and to broadly interpret the 14th Amendment for that purpose. The State of New York, for instance, recently passed a statute limiting the hours of labor of employees in public

¹ *Ritchie v. People*, 136 Ill. 98.

² *Holden v. Hardy*, 169 U. S. 366; *Powell v. Pennsylvania*, 127 U. S. 678; *Atkin v. Kansas*, 191 U. S. 207.

bakeries and the courts of the state sustained the statute on grounds of public welfare and on the theory that long hours of labor at the baker's oven were injurious to the health of the employee and to the body politic of which he was but a unit and a part. The Supreme Court of the nation, however, superimposed the opinion of its nine judges, or rather of the five who constituted its majority, upon that of the New York Courts and of the New York legislature and declared the law unconstitutional and an interference with individual liberty which was unreasonable and not justified on grounds of public health.¹ So, too, the desire seems present and the popular support forthcoming to follow the course advocated by Judge Amidon in his recent address² before the American Bar Association and to extend more and more the control of the Federal Government over commercial transactions and agencies of all kinds without regard to the precedents of the past and the restraints of its history and logic or the express terms of the Constitution. The intention is present in short to adopt an elastic construction of the Constitution, a construction which construes not in the light of the intention of the framers of the instrument in the past, but in the light of the exigencies of the present, and which, since the past and the written does not even in logic control, places the ultimate determination of all great national questions both social and industrial in the hands of the federal judiciary unrestrained by legal logic or by precedent. Everywhere in America indeed is to be found a government by the judiciary in matters which are social and industrial as well as in those which are political and governmental. The policies in short of the nation and of the several states are really dictated and are coming more and more to be dictated not by the social and political views of the members of our legislature but by the social and political views of the judges who sit upon the wool-sack. These facts the warring forces in the industrial struggle of to-day have come to recognize and the result has been a new movement in the political world. There is now to be noticed a determination by one party to place and keep the judiciary elective, in politics, and immediately responsive; by the other, as national appointive and if possible possessed of a life tenure. "Let the jury and the people decide" is the motto of one party; "the court must decide" is the motto of the other. The line has been drawn, the gauge of battle has been thrown, and among the most significant of all the modern industrial movements, and there have been many which have been significant, is the open entrance of organized labor into the political field and its reliance upon the suggestion made by Mr. Herbert Spencer over half a century ago that the great political battles of the future will be industrial battles and that the granting of the right to the ballot to the laboring classes has given to that majority the ultimate victory. The challenge on behalf of those who favor a life-term for the judiciary of the states as well as of the nation was issued in 1893 by no less a person than Mr. Justice Brewer in an address before the New York State Bar Association. The response was the beginning by Mr. William Jennings Bryan of his agitation for an elective federal judiciary and the entrance of the labor unions of the country generally and of Chicago in particular into the political arena for the avowed

1 *Lochner v. New York*, 198 U. S. 45.

2 See *Green Bag*, October 1907.

purpose of removing from the bench those judges whom they branded as "Unfair" and whose decisions and actions appear inimical to their interests.

(To be continued.)

ENGLISH CASES.

(Taken from *Select English Cases*).

Contract of affreightment—Loss arising from negligence of ship-owner's stevedore—Exception—Deviation.

Shipowners who by the bill of lading are exempted from liability for loss arising from the default of their stevedores in the loading, stowing, or discharging of the ship, cannot claim the benefit of that exemption where the ship has deviated from the voyage as described in the bill of lading. *Balian v. Joly, Victoria & Co.* (1890) 6 T. L. R., 345, followed. *Joseph Thorley, Ltd. v. Orchis Steamship Co., Ltd.* (1907) 1 K. B., 660 : 76 L. J. K. B., 595, 23 T. L. R. 338.

Damage—Remoteness—Fowl straying on road—Damage to passenger—Liability of owner.

As the plaintiff was riding a bicycle, some fowls of the defendant which were on the highway got frightened by a dog belonging to a third person, and one of them flew into the spokes of the plaintiff's bicycle and he was upset with the result that his cycle was damaged and he was injured.

Held, that even if the fowls were wrongly upon the highway, that is, even if the owner was guilty of negligence in allowing them to be there, still the negligence was not connected with the damage and the defendant was not liable.

The owner of the fowls is entitled to allow them to stray about the highway.—*Hadwell v. Righton* (1907) 2 K. B., 345.

MISCELLANY.

An amusing incident occurred last month at the Savoy Restaurant. An earl and his wife, who are prominent in social circles, presented themselves for dinner; they were not in evening dress, and M. Renaud, the manager of the restaurant, acting upon the well-known rule at the Savoy, was obliged politely to say that he was sorry not to be able to serve them. While evening dress is the rule at most restaurants and hotels, the Savoy is the only restaurant in London where it is *derigueur*. At the Carlton Hotel, it is compulsory in the palm court and practically in the restaurant, but if well-dressed people arrived late off a boat and slipped in to a table near the side-door, nothing would be said. At the Prince's Restaurant, if a couple chose, as they undoubtedly would, a table at the side of the room, out of observation, nothing would be said to them, while at the Hotel Cecil evening dress is compulsory in the restaurant, but not in the balcony outside.

This incident raises the vexed question whether restaurant proprietors can insist on evening dress. M. Renaud, having taken a poll of his *clientele*, is determined to enforce the rule. We may hear more about the incident.—*Law Notes*.

THE PUNJAB LAW REPOTER.

VOLUME IX].

14TH JANUARY, 1908.

[No. 2.

THE JUDGE AS A POLITICAL FACTOR.

BY ANDREW ALEXANDER BRUCE.

(Continued from page 4.)

On the side which is opposed to a life term judiciary is to be found not merely organized labor, but the more radical wing of the Democratic party and perhaps that of the Republican. On the other are to be found the vested interests, the conservatives of both the Republican and Democratic organizations, the ordinary business man, and, above all, that educated and respectable body of citizens, the college or professorial class, which Jack London characterizes as "noble, but not alive."

The interests of organized labor in the personnel of the courts and its appreciation of the political importance of the judiciary is modern in its origin and is the result of a logical growth. The doctrine that in a democracy such as ours every wrong can be righted at the polls and that where this remedy exists there is no excuse for anarchy and no justification for a resort to violence, has for a long time been taught in America and for a long time has served as a check to violence and insurrection. Like many others of its kind, however, it at first meant nothing, in so far as what is known as the labor movement was concerned, and could be safely urged even by those who were most inimical to the interest of the American working man. Until quite recently, indeed, the great conservative farmer class has everywhere controlled our elections. This body of small employers of labor has, except perhaps in the sole case of railroad ownership and control, been a body of confirmed individualists. The immediate interests of its members have lain in small wages and in long hours of toil. Its habit has always been to exaggerate the purchasing value of the wages paid in cities. It has known nothing of the injurious effects of the routine and mechanical toil incidental to the factory employments and to labor in the mines. It has, therefore, never looked with favour on the demand of the city laboring man nor of the wage-earner generally, and has been bitterly opposed to all labor unions and combinations, whether of capital or of labor. Since the growth of our large cities, however, and the organization of the armies of the working men who are now centered in the mining districts and who work upon the railroads, a

change has come. Although the farmer is still in the majority, he no longer everywhere possesses the balance of power. The Chicago delegation in the state of Illinois and the delegations from the manufacturing centers of the state of New York have for some time possessed a controlling influence not merely in the state legislatures, but in the national conventions, and the members of these delegations have found it necessary to consider and even to pander to the labor vote within their several districts if, indeed, they cared to retain their seats at all.

The immediate result of this change and this recognition of the strength of the labor vote was the passage in every state of the Union and in the National Congress itself of a number of statutes which limited the hours of labor in factories and in mines forbade the payment of wages in commodities or by means of orders on companies' stores, which regulated the method of weighing and screening coal, where the wages paid were dependent upon the amount of coal mined, which forbade the refusal of work to men or the discharge of men because of their membership of labor unions and which sought to determine by legislative enactment and in favor of the working man, the main questions in controversy in the great and ever present conflict between organized capital and organized labor.

These statutes were vigorously championed by the labor unions and were the result of their newly aroused belief in the value of the ballot and of their realization of their strength and political power. They were, however, with but few exceptions set aside by the courts as an unnecessary and unconstitutional interference with individual liberty and the individual right to property. The appeal to the ballot, so long looked upon as a laboring man's richest heritage, was found to be an illusion. The laboring man had found it possible to secure the legislation he desired, but only to discover an impassable barrier to the fruition of his desires in the conservatism and individualism of the judiciary. He, too, has in recent years found the judiciary yielding more and more to the demands of the mercantile interests and of the professional classes, and by the writ of injunction and proceedings for contempt of court, taking from him the weapon furnished by the strike and the boycott and even going so far as to declare the peaceable picket a criminal conspiracy and the closed shop unlawful.

The consequence has been a distrust on the part of organized labor of the American judiciary and a determination to control it. There is now everywhere apparent a determination to use the power of the ballot as a weapon against the "unfair judge" as well as against "the unfair legislator." A bitter and relentless opposition is now to be found to the idea of a life term judiciary which is now so frequently put forth and to the demand for the abolition of the jury, now so often urged. In its criticisms of the judiciary, as now constituted, and of the rules and decisions above referred to, organized labor does not perhaps always impute corruption, but it constantly argues prejudice; it constantly asserts that in the courts of law the laboring man and the labor union have no standing; that no matter what the working man may do the courts will decide against him; no matter what statutes may be passed in his favour, the

courts will declare them invalid. It frequently declares that the 14th Amendment to the Federal Constitution, which was adopted for the purpose of guaranteeing freedom to the negro, has been so construed by the courts as to enslave free labor; that the anti-pooling and anti-trust measures which were passed to control capital have been so construed as to control men. It argues that the judge, even though not so when first elected, soon becomes far removed from the common people; that he takes up his residence in an exclusive district; that his wife and children move in an exclusive society; that he has as a rule been a corporation lawyer before his elevation to the bench, especially if in the first place he has been appointed and not elected; that he knows but little of, and consequently comes to care but little for, the upward struggle of the great masses of men. It argues that the longer and more stable his term of office, the more aristocratic will he become. It lays down as a cardinal principle the doctrine that in a democracy such as ours, in which the judge can set aside legislative enactments and determine great social, governmental and industrial politics, he should understand, sympathize with, and be responsive to, the great social and industrial movement and ideals of the day, and should above all be made to feel that he owes his position to the ballots of the people.

The answer to this contention has been made by no less person than Mr. Justice Brewer of the Supreme Court of the United States. "There are to-day ten thousand millions of dollars invested in railroad property whose owners in this country number less than two million persons," said that jurist in an address before the New York Bar Association. "Can it be that whether this immense sum shall earn a dollar or bring the slightest recompense to those who have invested perhaps their all in that business and are thus aiding in the development of the country, depends wholly upon the whim and greed of the great majority of sixty millions who do not own a dollar? I say that so long as constitutional guarantees lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage it cannot. . . What then is to be done? My reply is, strengthen the judiciary. How? Permanent tenure of office accomplishes this. . . Judges are but human. If one must soon go before the people for re-election, how loath to rule squarely against public sentiment. . . To stay the wave of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he has, demands a tribunal as strong as is consistent with the freedom of human action, and as free from all influences and suggestions, other than are compassed in the thought of justice, as can be created out of the infirmities of human nature. . . The black flag of anarchism flaunting destruction to property, and therefore relapse of society to barbarism; the red flag of socialism inviting a redistribution of property, which in order to secure the vaunted equality must be repeated again and again, at constantly decreasing intervals, and that colorless piece of baby cloth which suggests that the state take all property and direct all the work and life of individuals, as if they were little children, may seem to fill

"the air with flutter. But as against these schemes or any other plot or vagary of fiend, fool or fanatic, the eager and earnest cry and protest of the Anglo-Saxon is for individual freedom and absolute protection of all his rights of person and property And to help strengthen that good time we shall see in every state an independent judiciary, made as independent of all outside influences as possible, and to that end given a permanent tenure of office and an unchangeable salary."

(To be continued.)

ENGLISH CASES.

(Taken from *Select English Cases*.)

Will—Construction—"Born" Meaning of—Child, en ventre sa mere.

A testator by his will bequeathed 500*l.* to each of his great-nieces born previously to the date of his will. An infant great-niece of the testator was *en ventre sa mere* at the date of the will.

Held, she was not entitled to the legacy. *Villar v. Gilbey*, (1907) A. C. 139, 76 L. J. Ch., 339 : 23 T. L. R., 392, distinguished. *Salaman, In re. De Pass v. Sonnenthal*, (1907) 2 Ch. 46: 76 L. J. Ch., 419.

MISCELLANY.

With the New Year an attempt will be made to rescue the first offender by means of a probation officer. We hope to give the provisions of the Probation of Offenders Act, 1907, in an early issue, but meantime our readers will be interested to know that after the 1st of January, 1908, power will be possessed by all the Courts, not merely in regard to binding prisoners over to come up for judgment, but to make special orders in regard to them, such as appointing a judicial guardian, or probation officer, whose duty it will be to watch over those bound over, to advise and help them, and, if possible, to obtain work for them. The greatest difficulties of many of those appearing in the dock is that it is almost impossible for them to get honest employment when the stigma of crime has once attached to them. From the beginning of the next year every Court will have an officer attached to it, whose duty it will be to visit and report with regard to first offenders.—*Law Notes*.

The order, under which the persons will be released on recognizances, will have special restrictions coupled with it, such as that the released person must not associate with known thieves, must be temperate, and if necessary, abstain from intoxicating liquor altogether.—*Law Notes*.

This new system is in reality a legalisation of the work done by the police-court missionaries—the most unselfish, hardworking and conscientious men in London. Hitherto their influence has been moral; in future they will have the legal guardianship of wrongdoers to back their moral influence. To Mr. William Wheatley, of the St. Giles' Christian Mission, this new system practically owes its origin, and all interested in the reformation of our criminals will wish it all success.—*Law Notes*.

THE PUNJAB LAW REPOTER.

VOLUME IX].

21ST JANUARY, 1908.

[No. 3.

THE JUDGE AS A POLITICAL FACTOR.

BY ANDREW ALEXANDER BRUCE.

(Concluded from page 8.)

The balance of power in this great struggle however and the controlling vote belongs neither to capital nor to organized labor, but to the so-called middle class. The members of this class are swayed by many conflicting interests and considerations. They have no general sympathy for organized labor nor for its grievances. The idea of a permanent judiciary appeals to them. They are to be found continually criticizing the jury system, especially in criminal cases and the dead level of intelligence which it presents. They frequently refer with approval to the ease with which convictions are obtained in the Federal and in the English courts where the judge is such an important factor. But they are nevertheless almost as skeptical of the courts as even organized labor itself. They are constantly thinking of the monopoly and of the trust, and the social power of the trust magnate over the judge is as much feared by them as is the social power of the employing classes by the laboring man. When Mr. Thomas Lawson in one of his articles included in a list of precepts supposed by him to guide the conduct of the Standard Oil Company one "Never to forget that our legal department is paid by the year and our land is full of courts and judges," he voiced a sentiment which unfortunately is only too prevalent. Equally prevalent too is the sentiment expressed in the unrestrained remarks of the lawyer iconoclast of Chicago, when in a recent address he said: "Decisions are made and bound in sheepskin. We lawyers burrow in dust to find out what some fool judge said a thousand years ago . . . and then we have the law . . . Take a poor man with a poor lawyer . . . a case argued with a giant on one side and a pygmy on the other, and the judge hearing the case whose associations have been with the rich. What show has the poor fellow got? Nobody is crooked or dishonest: it is just the natural course of evolution that has made the law of to-day. You can't get into court for nothing. Even if you could, you couldn't get along by yourself. You must have a lawyer. You can have any kind of a lawyer you can pay for. But you can't try your own case. You don't know how. The judge won't help you. He sits

"there to umpire the game and nothing else ; its all a lottery. If your case is just, that counts nothing. It depends upon a dozen things which make dice shaking a certainty compared with your game of chance. There is only one true thing about it, you always get a run for your money, as long as you have got any there is another court. There is no effort in the courts to get at abstract Justice It's merely a method that has been evolved through the ages for keeping society as it is." Even among the trading and professional classes, indeed, there is everywhere to be found the conviction that our lawyers and our judges are behind the age ; that they fail to recognize the basic needs of a growing civilization ; that they are shrouded in a formalism ; that the letter of the law killeth and that it is the bench and the bar who are responsible for this letter. The rash and incautious statements of men of note have added to this feeling. When the chief executive of the nation openly criticizes a Federal judge on account of a decision rendered by him on a technical point of law, what confidence in the judiciary can be expected of the great masses of the people ?

Unfortunately, English precedents are of but little value to us. The English judge interprets no constitution. He merely construes and applies the statutes. In England parliament is a legislative body and a constitutional convention in one, and its mandates are final. The English parliament controls the English courts and not the English courts the English parliament. If it were true in America as it is in England, that our judges did not have imposed upon them or had not assumed to themselves the decision of all of our great political questions and economic and industrial policies, the case would be very different. As long, however, as the contrary is the case, that is to say, as long as our written constitutions are looked upon as the fundamental law of the land, their amendment is so difficult as to be almost impracticable, and their interpretation is entrusted to our judiciary, the judicial office must of necessity be more or less political, and permanence of tenure and appointment as opposed to election will be vigorously assailed by a large portion of the American people. Longer terms of office and larger salaries will no doubt be soon generally conceded in the several states, but life term state judiciaries will, it is believed, only be acquiesced in when the judges by constitutional amendments are deprived of the power to exercise or by their own volition cease to exercise the political and legislative powers which they assume to-day.—GRAND FORKS, NORTH DAKOTA, OCTOBER 1907.

—*The Green Bag.*

ENGLISH CASES.

(Taken from Select English Cases.)

Contract—Unlawful agreement—Promise to indemnify plaintiff against costs of action brought against plaintiff for libel published at promisor's request.

In consideration that plaintiff had published a libel at defendant's request, and had at the like request consented to defend an action

brought against plaintiff for such publication, defendant promised to indemnify plaintiff from the costs of the action: *Held*, that the promise was void.—*Shackell v. Rosier* 2 Bing, N. C. 634: 3 Scott, 59: 2 Hodges, 17: 5 L. J. (N. S.) C. P. 193: 42 R. R. 666.

Evidence—Reputation as to public rights—Evidence showing no right, admissible.

Evidence may be given of reputation that a certain place situate on the bank of a river is not a public landing place for all the King's subjects.—*Drinkwater v. Porter*, 7 Car. & P. 181: 48 R. R. 779.

Lunatic—Committee—Death of lunatic—Subsequent receipts by committee—Liability of surety.

If the committee of the estate of a lunatic receive rents of the estate after the lunatic's death, he (the committee) is not accountable in the lunacy in his character of committee for the rents so received; and therefore, if he has made default his surety is not liable for any such receipts.—*In re Walker*, (1907) 2 Ch. 120: 76 L. J. Ch. 580.

Master and servant—Negligence—Servant lent to another—Control over servant—Liability of Master for servant's negligence.

The defendants hired out an engine to another person, and they supplied a driver for the engine. They paid the driver, supplied the oil for the engine, and kept it in repair. The person to whom the engine was hired could direct where the engine should go and what loads it should carry, and the defendants never knew where the engine was sent to or what it carried. While so hired, the engine, by the negligence of the driver, injured the plaintiff.

Held, that the defendants who appointed and paid and who could dismiss the driver, had control over him at the time of the injury, and were therefore liable to the plaintiff.—*Dewar v. Tasker and Sons, Ltd.* 23 T. L. R. 259.

MISCELLANY.

The report of the Commissioners of Prisons for the year 1906-07 shows that the population, daily and average, of both local and convict prisons, is beginning to fall. In the local prisons, for example, it was last year 17,911, as against 18,288; and in convict prisons 3,032, as against 3,135. A table of the prison population from 1881 to the present year shows that the number of commitments per 100,000 of the population has fluctuated considerably during the last quarter of a century. It varies from the highest (621·6) in 1882-3 to the lowest (460·7) in 1900-1. From 1900-1 there was a progressive rise till 1904-5, when the increase received a check, a small decrease occurring that year. During the year

under report there has been a further notable decrease, the number being 516·2 per 100,000 of the population. This decrease, say the Commissioners, was almost entirely in cases tried summarily, which were fewer by 16,707 than in the preceding year.

The report confirms the general idea that the nation is becoming more sober. There is a further diminution of 5,202 for drunkenness, 682 for breach of police regulations, etc., and 588 for assault. There has also been a decrease of 1 72 for larceny, 678 for offences against Highway Acts, 325 for malicious damage, 1,847 for offences against the poor law, 1,835 for prostitution, and 2,379 for begging and sleeping out.—*Law Notes.*

REFRESHER NEEDED.—Secretary Elihu Root is said to have been one of the best paid attorneys in the United States. General Corbin, who used frequently to accompany him upon horseback excursions, was embarrassed by his fruitless efforts to engage Root in conversation. Becoming desperate from his repeated failures, Corbin, in speaking of the dilemma, said: "Why, the man is so accustomed to being paid for talking that I'll be hanged if I believe he will talk unless he is paid for it. I'll have to pay him a stiff fee to hear the sound of his voice."—*Argonaut.*
—*The Green Bag.*

REVIEW.

The Punjab Alienation of Land Act (XIII of 1900) as amended by Punjab Act I of 1907 with Notes, Notifications, Rules and Circulars—By S. Gurcharn Singh, B. A., LL. B., (Cantab) Barrister-at-Law, Fellow Punjab University and Law Reader, University Law College. Price Rs. 3.

The Bench and the Bar will welcome the second edition of Mr. Gurcharn Singh's highly useful annotated edition of the Punjab Alienation of Land Act. A cursory glance shows that no pains have been spared to enhance the usefulness of the book by including everything which a practitioner and a Judge might require to know in interpreting the provisions of the Act and applying the same to particular cases. The Albion Press may also be congratulated for excellent get up of the book.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

28TH JANUARY, 1908.

[No. 4.]

THE EXERCISE OF NON-JUDICIAL FUNCTIONS BY THE JUDICIARY.

In the European States the theory of separation of powers has been accepted as a decree that the legislative and executive branches, in the administration of public affairs shall be free from interference by the judiciary. In America, however, the separation of powers has not been taken as a limitation upon the judiciary, but rather as an elevation of it to the position of an independent department of government as supreme in its particular field as either of its co-ordinate departments in theirs. If this theory of governmental organization is to be successfully executed, it is imperative that each department exercise vigilance to see that none of the functions delegated to it by the constitution are exercised by co-ordinate departments; equally, it must be careful not to infringe the prerogatives of the other branches. Moreover, a proper respect for its dignity as an independent, co-ordinate branch of government must compel it to decline to perform duties where its final action is to be subjected to review by another department. It would seem that, with the prerogatives of each department thus guarded, the whole purpose of the separation of powers is achieved. Subject to these limitations each department should be free to perform any duties assigned to it. The practical difficulties in the operation of this scheme of government arise from the fact that all the functions of government are not capable of being readily subjected to classification as executive, legislative, or judicial. Indeed it is asserted that some of the functions of government may equally well be assigned to any one of the departments. However, the tendency of the courts has been to insist that none but judicial functions may be exercised by the judiciary. Although this assertion may rest in part on a theory that the constitution has granted to the judiciary only judicial powers it seems generally due to the repetition of a dictum by federal judges on their refusal to render a judgment which would be subject to revision by the executive department. If it is proper for the judiciary to decline to perform any but judicial functions, it must also be proper for the executive to decline to perform aught but executive functions and for the legislature to refuse to do anything not in its essence legislative. And, consequently if it is true that some functions of government do not properly fall within any particular department, either the constitu-

tional machinery is hopelessly inadequate or this theory of limitation of departmental activity must fall.

It is inconceivable that the introduction into our constitutions of the theory of the separation of powers makes it possible that any function of government must remain unexercised because of difficulty in ascertaining to which department it properly belongs. Certainly, the judiciary cannot, with propriety, decline to perform a duty attempted to be imposed upon it, unless the department to which that duty belongs is definitely ascertained to be one other than the judicial. The Appellate Division of the Supreme Court of New York has recently sustained the constitutionality of a statute which imposed on the Courts the duty of rendering decisions on disputed election ballots, counting all the ballots cast, and issuing an order which should supersede the regular election returns. *Metz v. Maddox*, 105 N. Y. Supp. 702. Although this statute imposes duties which differ in many respects from those ordinarily performed by Courts, it does not seem possible to attribute those duties with certainty to either the executive or the legislative departments. It is, therefore, conceived that the true theory of the separation of powers supports the assumption of this burden by the judiciary. (*H. L. R.*)—*The Madras Law Review*.

ENGLISH CASES.

(Taken from Select English Cases).

Arbitration—Award silent as to one matter—Bad.

Four actions between distinct parties, and all matters in difference, were referred to an arbitrator. Among the matters in difference was a fifth action, relating to a part of the premises in dispute, of which fifth action the award took no notice, notwithstanding it had been mentioned to the arbitrator: *Held* that this omission rendered the award *bad in toto*. *Stone v. Phillipps*, 4 Bing, N. C. 37 : 5 *Scott*, 275 : 3 *Hudges*, 302 : 7 L. J. (N. S.) C. P. 54 : 6 Dowl, P. C. 247 : 44 R. R. 645.

Contract—Illegal consideration—Gaming—Money lent for purpose of playing Hazard.

Money lent for the purpose of gaming, and of playing with at an illegal game, such as hazard, cannot be recovered back, for it is lent for the purpose of a violation of the law, and enabling the borrower to do a prohibited act. *Cannon v. Bryce*, 3 S. C. (O. S.) 88 : 22 R. R. 342 : 3 B. & Ald. 179 followed. *M'Kinnell v. Robinson*, 2 Meeson & Welsby, 434 : 1 H. & H. 146 : 7 L. J. (N. S.) Ex. 149 : 2 Jur. 595 : 49 R. R. 672

Defamation—Privileged communication—Words spoken by subscriber to charity respecting conduct of medical man in attendance upon objects of charity.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber respecting the conduct of a Medical man in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. *Martin v. Strong* 5 Adol & Ellis 535 : 1 N. & P. 29 : 2 H. & W. 336 : 6 L. J. (N. S.) K. B. 48 : 44 R. R. 487.

Landlord and Tenant—Repair done by landlord though not bound to repair—Negligence of his servant in executing Repair—Landlord's liability—Nuisance.

An action for nuisance can be maintained where a person's rights of property have been affected by the nuisance ; but a person who has no interest in property no right of occupation in the proper sense of the term, cannot maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house.

No rights can be acquired under a contract except by the parties to the contract, except in certain special cases, therefore, where there is no contractual relationship between the plaintiff and the defendant, and the defendant undertook no duty towards the plaintiff, that is, where the act of the defendant was not done in the discharge of any duty which he owed to the plaintiff, a cause of action arising from negligence of the defendant is not maintainable. *Malone v. Laskey*, (1907) 2 K. B. 41 : 76 L. J. K. B. 1134.

Nuisance—Offensive trade—Trade carried on before plaintiff occupied adjoining messuage—no answer.

To an action of nuisance for carrying on the business of a tallow chandler, in a messuage adjoining the messuage of the plaintiff, it is no plea that the defendant carried on the business before the plaintiff became possessed of and occupied the adjoining messuage. *Bliss v. Hall*, 4 Bing, N. C. 183 : 5 Scott, 50 : 1 Arn, 19 : 2 Jur 110 : 7 L. J. (N. S.) C. P. 122 : 6 Dowl, P. C. 442 : 44 R. R. 697.

Will—Executor acts and dies—Probate afterwards—Act valid.

If an executor does an act and dies without proving the will, the act will be valid if the will is ultimately proved. *Brazier v. Hudson*, 8 Simons, 67 : 5 L. J. (N. S.) Ch. 296 : 42 R. R. 106 : 59 Eng-Rep. 27.

MISCELLANY.

A WILL FROM THE PROVINCES.—Preston, Nova Scotia, is the home of quite a body of the colored race. Their frequent litigations have made them so keen on the law that they even try their hands at will drawing. The following is one of the most famous examples in the Halifax probate office :

IN THE NAME OF GOD ; AMEN :

I, Alexander Taylor, in Preston do declare this to be my last will and testament. First, I do hereby bequeath my body to the dust and my spirit to God who gave it.

Secondly I do hereby to my son John Taylor, Blacksmith in Halifax and his heirs forever my land joining on the east side of Salmon River, Preston, containing 280 acres with house and out-houses to the aforesaid John Taylor forever.

And the land must be sold as soon as possible for to maintain me and my wife Margaret Taylor.

I have appointed James Lawlor in Dartmouth to sell the land and give what money it brings to the aforesaid John Taylor and him to collect and pay off what debt is upon the place and the remainder is for to maintain me and my wife as long as God is pleased to let us live in this world.

18 day of July, 1866. Alexander Taylor (L.S.)—*Green Bag*.

PLEASANTRIES.—The second day drew to its close with the twelfth jurymen still unconvinced. "Well, gentlemen," said the court officer, entering quietly, "shall I, as usual, order twelve dinners?" "Make it," said the foreman, "eleven dinners and a bale of hay."—*New York Press*.—*Green Bag*.

HIS OCCUPATION.—Magistrate (to prisoner)—What is your occupation? Prisoner—I am a locksmith, your worship. Magistrate—And how came you to be found in a gambling house? What were you doing when the police appeared? Prisoner—Making a bolt for the door.—*London Mail*.—*Green Bag*.

AN APT COMPARISON.—When Ab del Hakk was poor he was one day travelling across a weary plain, says the author of "Life in Morocco," and was very hungry. So he came to the house of the Widow Zaidah, who was also poor; but when he made known his want she set before him two hard-boiled eggs, all the food there was in her house.

Later, when Abdel Hakk lived in Marokesh and was very rich, Meludi, the lawyer, disliking him, persuaded the Widow Zaidah to sue him for the eggs; but not for the eggs alone, for they would have become two chickens, which in time would have so multiplied that the whole fortune of Abdel Hakk would not now pay for them. When the case came to trial the rich man was not in court

"Why is the defendant not here?" demanded the judge

"My lord," said his attorney, "he is gone to sow boiled beans."

"Boiled beans?"

"Boiled beans, my lord."

"Is he mad?"

"He is very wise, my lord."

"Thou mockest!"

"Surely, my lord, if hard-boiled eggs can be hatched, boiled beans will grow."

The suit was promptly dismissed with costs to the plaintiff.—*Green Bag*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

7TH FEBRUARY, 1908.

[No. 5.]

NEGOTIABILITY.

A clear conception of the meaning of this word is frequently conspicuous by its absence in the minds of students. A common definition of a negotiable instrument—is an instrument, the property in which passes from hand to hand by delivery ; but this, as Mr. Willis points out in his admirable little book, “The Law of Negotiable Securities,” does not go far enough. A book, for instance, is transferable by delivery, but it is not negotiable. If it were stolen and sold, except in market overt, the property therein would revert in the true owner on the thief being prosecuted to conviction, whereas, if the book were a negotiable instrument, the property in it would pass to any one who acquired it *bona fide* and for value. Thus to give a complete description of a negotiable instrument, it is necessary to say : not only that it is an instrument which is transferable by simple delivery, but is of such a kind that the property in it is acquired by any one who takes it *bona fide* and for value.

As regards the first part of this description, it must be borne in mind that if the instrument be not in such a state as will enable the property in it to pass by delivery, it is not negotiable. The case of *Whistler v. Forster*, 14 C. B., N. S., 248, is instructive on this point. In that case Whistler gave full value for a cheque drawn to the order of a payee, but inadvertently omitted to obtain the payee's indorsement. Subsequently, he received notice from the drawer, that the cheque had been obtained by fraud, and after receipt of this notice he obtained the payee's indorsements. But he was then too late. The cheque, when Whistler obtained it, was not transferable by delivery, because it had not been indorsed, and the indorsement was only obtained after he had had notice of fraud. Had he, however, obtained the indorsement at any time before receiving notice of the fraud, he would have had a good title and could have recovered from the drawer.

On the question of *bona fides*, it should be said that the holder is not bound to make any enquiries before acquiring the instrument, but if, as Mr. Willis says, he refrains from making enquiries because he suspects there is something wrong, he is not an honest holder. Carelessness is excused, but not dishonesty. This is excellently illustrated by the case of *Raphael v. Bank of England*, 17 C. B., 162. The plaint-

iffs were money changers in Paris, and sued in respect of a Bank of England note, of which they were the holders. This note, with others, had been stolen, payment thereof stopped, and notice given to all the money changers in Paris, including the plaintiffs. At the time the plaintiffs cashed the note, they had actually in the office a list of the stolen notes, but omitted to look at it, and, as it was found, cashed the note without having any suspicion in their minds that there was something wrong. On this a verdict was given for them, their action, though careless, not being dishonest.

On the question of consideration, the amount thereof is of no importance except as affecting the question of *bona fides*. If small value is given for a good bill, it helps to show that the person giving the consideration was not acting honestly, or, rather, suspected that the man from whom he took it was not acting honestly, in the same way that the question of undervalue affords a good test in deciding whether a receiver of stolen goods has acted criminally. The giving of under-value does not prove dishonesty, but is confirmatory evidence of it.

So much for the questions of transferability, *bona fides*, and consideration. There remains the question, what are the instruments the property in which passes to anyone who acquires them *bona fides* and for value, though they may have passed from the possession of the true owner through theft or fraud? Such instruments are of two kinds, those made in England, having their nature, incidents, and effects defined by English law, and those created in foreign countries, and it is necessary that they should be dealt with separately, because of the distinction that was taken between them in the earlier cases. As regards English securities, there are two ways by which an instrument can acquire the character of negotiability, by law merchant, that is by the usage or custom of merchants, or by Statute. So far as negotiability by usage is concerned, it was held until comparatively recently that the list of negotiable securities coming into existence under English law was closed until the Legislature itself annexed the incident of negotiability to some fresh instruments. Thus in *Putridge v Bank of England*, 9 Q. B., which concerned a dividend warrant payable to the payee alone, without the words "or order," or "or bearer," it was held that notwithstanding a proved usage of merchants for sixty years to treat such an instrument as negotiable, the instrument was not negotiable and could not be made so by any number of years' usage. And this decision was confirmed by that of Mr. Justice Blackburn, in *Crouch v. The Credit Foncier*, 8 Q. B., 374.

But signs of a different tendency appeared in the reasoning employed by judges in other cases. Thus in *Goodwin v. Robartes*, 10 Ex., 76, Cockburn, C. J., said:—"Usage having been the origin of the so-called law merchant as to negotiable securities, what is to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedent they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? This case concerned the scrip of foreign bonds issued by the Russian Government, and it was held by

the Court of first instance. the Court of Appeal and the House of Lords, that such scrip had acquired the incident of negotiability by usage. It was contended by counsel for the appellant, that it was not competent for a few bankers and merchants to create a floating right of action on a written instrument on any person into whose hands the writing might come, and so to set up a practice which should bind the general public, and in particular he objected to such an instrument as scrip being held to be negotiable, which did not promise to pay any money at all, but merely to deliver another instrument when the agents of the foreign Government in England got it. But it was proved that the scrip or loans of foreign Governments, entitling the bearers thereof to a bond of the same amount when issued by the Government had been well known to, and largely dealt in by bankers, money dealers, and the members of the English and foreign Stock Exchanges, and through them by the public for over fifty years, and thus the distinction between the scrip and the bond could not be maintained, and the scrip was negotiable in the same way as the bond itself would have been negotiable under the authority of *Gorgier v. Vieville*, 3 B. & C., 45.

(To be continued.)

INDIAN CASES.

(PRIVY COUNCIL DECISIONS.)

Birt tenures—Heritability—Transferability.

Persons who hold under the Birt or Birt zimindari tenure in the district of Gonda in Oudh, have heritable and transferable rights as against the *tslukdar*, in the villages in respect of which the Birt has been created.—*Raja Muhammad Mumtaz Ali Khan versus Murad Bakhsh*.—6 *Calcutta Law Journal*, 693.

Evidence. Admissibility of—Omission to take objection—Exchange. Deed of, admissibility of—

Upon a question of disputed pedigree, a geneological table which had been previously filed in a suit in 1804, was tendered and received in evidence without any objection in the Court of first instance.

Held, that it was too late for the respondent in the Court of appeal to take exception to its admissibility.

A certified copy of a deed of exchange which bore date 1782, was also received in evidence as containing a recital which supported the case of one of the parties.

Held, that the document was admissible upon the question of the descent and relationship of the parties.—*Shahzadi Begam versus The Secretary of State for India in Council*.—6 *Calcutta Law Journal*, 678.

MISCELLANY.

GERMAN LAWYERS ARE SO SLOW.—Chauncey Depew paid \$31.75, because his motor-car frightened a team in Germany. The remarkable thing is that of this the \$1.75 and not the \$30 was the lawyer's fee.—*Kansas City Times*.—*Green Bag*.

AN EYE TO BUSINESS.—*Lawyer*: I can get you a divorce without publicity for about a hundred pounds.

Society Woman.—How much more will it cost with publicity?—*Illustrated Bits.*—*Green Bag.*

The probation of Offenders Act is not confined to first offenders. It authorises a Court of summary jurisdiction when an offence punishable by it is proved, if it thinks it expedient, either (1) to dismiss the case, or (2) to discharge the offender on security to be of good behaviour and come up for judgment within three years. And it gives the same power to any Court before which an offender is convicted on indictment of a crime for which he can be imprisoned. In both cases, damages (limited as regards a Court of summary jurisdiction to £10) and costs may be ordered to be paid; and probation officers are to be appointed to look after offenders dealt with under the Act.—*The Law Students' Journal.*

The Money-lenders' Act 1900, enacts that a money-lender shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses and at no other address. This part of the Act had to be applied by Lawrence, J., on the 9th ult. in *Staffordshire Financial Company v. Hunt*. The plaintiffs' only registered address was at Walsall, but the transaction in question took place at the office of one Lester in London. It seems Lester himself lent money, and also introduced customers to money-lenders for a commission always paid by the customer. In the course of nine years Lester had introduced over a thousand customers to plaintiffs. In each case the advance or renewal was decided on at Walsall, the money was remitted to Lester, and the promissory notes were signed and made payable at Lester's office. It is manifestly a question of fact whether the plaintiffs carried on business in London, and the number of transactions caused the learned judge to hold that they did; consequently the promissory note on which the action was brought was void.—*The Law Students' Journal.*

In the average we think it is an agreed fact that illegitimate children, according to English law, suffer quite enough for the sins of their parents. But the provisions of the Workmen's Compensation Act show a new tendency in our legislation which doubtless some austere moralists of the old school will view with considerable disfavour. A case was recently before the Westminster County Court, in which a workman whose death afforded the subject matter of the claim, had two establishments. One with his wife, by whom he had four children, and another with a woman who had lived with him for a considerable number of years, and by whom the workman had three children. The wife knew nothing of the existence of the other establishment. In construing the Act, the County Court Judge was obliged to hold that the illegitimate children were entitled to share equally with the legitimate ones in the sum which the employers paid into Court under the Act. The learned judge considered that the legitimate children were, as it were, robbed of their patrimony by reason of their father's illicit intercourse, and considered that the result of the Act was "startling." Now why? We have no desire to go into the ethics of the case. We simply quote it as an interesting point of law, and we leave our readers and the austere moralists above referred to to consider what is right, just and equitable in the matter.—*The Law Students' Journal.*

THE PUNJAB LAW REPORTER.

VOLUME IX.] 14TH FEBRUARY, 1908.

[No. 6.]

NEGOTIABILITY.

(Concluded from page 19.)

Although this case of *Goodwin v. Robartes* dealt with foreign instruments, the reasoning adopted yet showed the increased tendency of the Courts to take judicial notice of mercantile usage; and the final plunge was taken by Mr. Justice Kennedy in the *Bechuanaland Exploration Company v. London Trading Bank*, 1898, 2 Q. B., 658, where, with regard to debentures to bearer issued by an English Company in England, it was held that they were negotiable according to mercantile usage, and the evidence as to length of usage being sufficient, their negotiability was held to be established. This was certainly a far cry from the theory held by Mr. Justice Blackburn, in *Crouch v. Credit Foncier*, which also concerned a debenture payable to bearer, and was held to be an instrument of such recent introduction, that the quality of negotiability could not be made incident to it by mercantile usage. "Where the incident," said Mr. Justice Blackburn "is of such a nature that the parties are not themselves competent to introduce it by express stipulation no such incidents can be annexed by the tacit stipulation arising from usage. It may be annexed by the ancient law merchant, which forms part of the law, and of which the Courts take notice. Now if the ancient law merchant annexes the incident, can any modern usage take it away?"

In *Edelstein v. Schuler*, (1902) 2 K. B., 144, an action was brought by the plaintiff against Messrs. Schuler for conversion of certain bonds of the *Buchuanaland Railway Company*, an English Company registered under the Companies Acts. It appeared that the plaintiff kept these bonds in a safe at his office, from which they were stolen by one of his clerks. This clerk sold the bonds through the defendants as stock-brokers, and they admittedly had no notice of any infirmity in the vendor's title, and acted throughout with perfect *bona fides*. On discovering the theft, the plaintiff brought an action against the brokers for conversion. The money secured by the bonds were by the form of the instruments made payable to the bearer.

The question of the defendant's liability thus turned on the point whether such bonds were negotiable instruments. A body of evidence was called at the trial to show that all these bonds passed from hand to

hand among the people who dealt in them, and that they were treated as negotiable in the same way as the bonds of foreign Governments. For the plaintiff it was argued that the attribute of negotiability could not be attached to a contract except by the law merchant, and that the bonds in question were of such recent origin that their negotiability under that branch of the law could not be justified. But Mr. Justice Bigham held that, on the evidence of usage, the bonds were negotiable, and his words are worthy of attention. "It is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of transactions which help to create it than on the time over which the transactions are spread. Therefore the comparatively recent origin of this class of securities in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code, but is capable of being expanded and enlarged so as to meet the wants and requirements of trade. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law. I go perhaps further than Mr. Justice Kennedy intended to go (in *Bechuanaland Exploration Company v. London Trading Bank*), for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable and that the Courts of Law ought to take judicial notice of it."

The law being thus judicially determined, manifestly no final list of instruments negotiable by the law of England can be given. But as to the negotiability of the following instruments there can be now no dispute; Bills of exchange, promissory notes, bank notes, cheques, excheque bills, dividend warrants, bonds or debentures payable to bearer, and East India bonds, this last being, according to Mr. Willis, the only case in which negotiability has been added by Act of Parliament to an instrument made on our own soil and arising under our own law. Share certificates, scrip for certificates of shares and share warrants are probably not negotiable, though there seems to be no direct authority for this.

As regards foreign instruments, the leading case is *Georgier v. Mieville*, where it was held that bonds of the King of Prussia were negotiable instruments, on the ground that they had so been treated by the usage of the English markets, and it may be laid down from this case that instruments made abroad and dealt with here can become negotiable by the usage of our own markets, whether or not they are negotiable in the country of their origin, but the fact that they are negotiable in such country does not, apart from usage, make them negotiable here. Again, such instruments cannot become negotiable even by usage here, if it is necessary to do some act out of England in order to pass the title to them, or, in other words, if simple delivery of them is not sufficient. Thus, in the *London and County Bankers Company v. The London and River Plate Bank*, 20 Q. B. D., 232, certifi-

cates of shares in the Pennsylvania Railway Company were held to be not negotiable, since, in order to pass the property in them, it was necessary to transfer them, either personally or by attorney, in the books of the Company, which were in America.—*The Law Students' Journal*.

INDIAN CASES.

(PRIVY COUNCIL DECISIONS.)

Mortgage—Redemption, Partial.

One J. was second mortgagee of a four annas share of a property. He redeemed a first mortgage upon a twelve annas share inclusive of his four annas. A subsequent second mortgagee of the eight annas share redeemed the first mortgage upon the whole twelve annas.

Held, that J. was entitled to redeem the four annas upon which he had a second mortgage.—*Jawahir Singh versus Baldeo Bakksh Singh*, 6 *Calcutta Law Journal* 672.

Musha. Doctrine of—Shares in Companies—Death-bed gift.

The doctrine relating to the invalidity of gifts of *Musha* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules. *L. R.*, 16 *I. A.*, 207 *applied*.

The doctrine ought not to be applied to shares in Companies and freehold property in great commercial towns which were not within the original scope of the rule and could be included within its operation only by a logical or constructive application.—*Ibrahim Goolam Ariff versus Saiboo*, 6 *Calcutta Law Journal* 695.

MISCELLANY.

COUNSEL TOO MUCH EMPLOYED.—Lord Brougham says it was once said by Bearcroft, when much employed in the House of Commons Committees, and seen walking about in the Court of Requests, unmoved by the many calls of his name in all quarters, that he was there to avoid giving undue preference to any of his clients.

At a later date, Charles Austin, the great Parliamentary Counsel, was seen riding in Rotten Row one day, when many Committees were sitting, in each of which he held a brief. His explanation was that he did not wish to offend any of his clients by giving his services to one only!—*The Madras Law Journal*.

The lawyers such a profit make,
 As olden stories tell,
 'Tis said that they the oyster take,
 And clients get the shell ;
 But, should a pearl be found, good luck !
 As pearls therein may dwell,
 Would clients say—" Come, give me back
 The oyster for the shell " ?—*The Madras Law Journal*.

THE CHIEF JUSTICE PLEADING IN HIS OWN COURT.—During the Chief Justiceship of Lord Holt, the valuable sinecure office of Chief Clerk of the Court of Queen's Bench fell vacant, and the Chief Justice gave the appointment to his brother, Roland Holt. The Crown disputed the appointment, claiming the patronage. The matter was brought to a trial at bar, before the puisne justices and a jury. A chair was placed on the floor of the Court for the Chief Justice, on which he sat uncovered near his counsel. The practice as to the office was proved, and ultimately a verdict was given against the Crown and in favour of the Chief Justice. *The Madras Law Journal*.

REVIEW.

Student's Guide to Roman Law—(Justinian and Gaius) By Dalzell Chalmers and L.H. Barnes, B.A., Barristers-at-Law—Printed by William Clowes and Sons, Limited, London and Beccles and published by Butterworth and Co., 11 and 12, Bell Yard, Temple Bar, W.C., Law Publishers, London.

The work has been compiled under the belief, which we have no doubt is well founded, that there existed a need for a concise and simply worded text book on Roman Law which would serve as an introduction to the standard authorities. The essential principles of Roman Law as they are to be found in the texts of Justinian and Gaius have been inserted in a condensed form with great care, and, besides much other useful information, English parallels have also been given in certain instances. We have no doubt that this treatise will be welcomed by Indian Students.

The introduction and five appendices considerably add to the attractions of the book.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 21ST FEBRUARY, 1908.

[No. 7.]

WAIVER OF TRIAL BY JURY IN CRIMINAL CASES.

The apparent confusion on the question whether the issue of fact raised by a plea of not guilty may, with the consent of the parties, be tried by the Court without a jury, seems to have arisen from the dicta of judges, who have propounded a doctrine of waiver of constitutional rights instead of construing the enacted law. It is believed that almost all the holdings in point may be reconciled by a scrutiny in each case of the constitutional and statutory provisions, and the grade of the offence. Where a constitution provides that there shall be no conviction except by verdict of a jury, the Court alone cannot have jurisdiction of the issue,¹ and a statute permitting waiver of jury would seem invalid;² even minor offences may have been within the intent of the enacting convention.³ But most of the state constitutions merely declare that the right of trial by jury shall remain inviolate, or that the accused shall enjoy the right to a trial by jury, and under such provisions the Courts have almost universally upheld statutes, permitting waiver,⁴ even in cases of felony.⁵ In the absence of such statutes, however, the law of criminal procedure must be derived from the common law, and since at common law trial by jury prevailed exclusively, trial by the Court is unauthorized and invalid.⁶ A more common but much less sound explanation is that public policy, as dictated by the constitution, forbids waiver.⁷ Neither of the arguments against waiver applies, however, to offences of the sort which, at the time of the adoption of the constitution, were dealt with summarily by justices of the peace, or by Courts of special sessions.⁸ For these minor offences, not being formerly triable by a jury, are usually considered not to have been intended to be within the constitutional guarantee,⁹ and hence not to be within the scope of the alleged constitutional policy against waiver;¹⁰ and there is sufficient precedent to give a Court authorization in such cases to be the sole tribunal.

1 *State v. Holt*, 90 N. C. 749.

2 *State v. Cottrill*, 31 W. Va. 162. *Contra*, *State v. Griggs*, 34 W. Va. 78.

3 See *State v. Stewart*, 89 N. C. 563.

4 *Edwards v. State*, 45 N. J. L. 419. *Contra*, *Brimmingsool v. People*, 1 Mich. N. P. 260.

5 *Murphy v. State*, 97 Ind. 579; *State v. Worden*, 46 Conn. 349.

6 See *Harris v. People*, 128 Ill. 585. *Contra*, *Wren v. State* 70 Ala. 1.

7 *Of Cancemi v. People*, 18 N. Y. 128.

8 *City of St. Charles v. Hackman*, 133 Mo. 634. *Contra*, *State v. Maine*, 27 Conn. 281.

9 *Murphy v. People*, 2 Cow. (N. Y.) 815.

10 *Schick v. United States* 195 U. S. 65. But see dissenting opinion,

Moreover, a statute which provides that issues of fact shall be tried by a jury is held, in a recent case in a jurisdiction where the provisions of the Constitution of the United States apply, to prohibit waiver of jury. *In re Mc Quown*, 91 Pac. 689 (Okl.). Where there is such a statute there can be no other tribunal even for minor offences unless further provision is made.¹¹ Without such statute the two sections of the Constitution involved,¹² construed together, have the force, not of those state constitutions which prescribe the exclusive use of trial by jury, but of those which merely protect the right to such trial.¹³ Consequently a federal statute permitting waiver is constitutional;¹⁴ and in a federal court, without such statute, a jury may be waived in the trial of a minor offence.¹⁵

The sole legal question, then, is always one of construction, not of policy. From the point of view of public policy, it may be said that waiver of jury trial conduces to efficient and expeditious criminal administration; but, on the other hand, it endangers the existence of the jury system. A plea of guilty, not raising an issue to be tried, does not waive the right of trial by jury.¹⁴ Nor are the above considerations applicable to the question whether a defendant may elect to be tried by a jury consisting of other than twelve men; a statute permitting waiver of the whole jury does not permit waiver of one juror.¹⁵ — *The Harvard Law Review*.

ENGLISH CASES.

(Taken from *Select English Cases*.)

Arbitration—Award by two of three arbitrators—Objections of third arbitrator not considered.

A dispute was referred to the decision of three arbitrators, or any two of them. A proposed award was shewn at a meeting of the three, to which one of them objected, and he, after a discussion, declared that, if the other two would not alter their view, they must make the award by themselves, and he would not join in it. Afterwards, a draft, different from that of the proposed award, was sent by mistake to the last mentioned arbitrator, by the other two; and he returned it with comments and objections. The two others subsequently made an award corresponding with that originally proposed, without again submitting it to the third arbitrator.

The Court set the award aside. *In re Pering*, 3 Adol. & Ellis. 245: 42 R. R. 376: 8 R. C. 268.

¹⁰ *Schick v. United States*, 195 U. S. 65. But see dissenting opinion.

¹¹ *Bond v. State*, 17 Ark. 290. But see *People v. Smith*, 9 Mich. 193.

¹² Art. III. § 2; Amend. VI.

¹³ *Belt v. United States*, 4 D. C. App. Cas. 25.

¹⁴ *West v. Gammon*, 98 Fed. 426.

¹⁵ *Brown v. State*, 16 Ind. 496. *Contra*, *State v. Walls*, 69 Kan. 792. *Cf.* 9 Harv. L. Rev. 358.

Master and servant—Discharge of servant—Improper conduct—Recovery of current salary.

A servant discharged for improper conduct cannot recover any part of the salary current from the last pay-day at the time of his dismissal.

A master, who has dismissed a servant, may justify the dismissal by shewing that at the time of the dismissal he knew the servant to have committed an act which justified it, and a jury ought not to be asked whether the master was induced to dismiss him by that act or by some other cause.

A clerk employed by a company to enter proceedings in their minute book, entered on the margin of the minute book a protest in his own name, against a summons for appointing a successor to himself.

Held, that a jury were justified in finding this to be a sufficient cause of dismissal *Ridgway v. Hungerford Market Co.*, 3 *Adol. & Ellis*, 171; 4 *N. & M.* 797; 1 *H. & W.* 244; 4 *L. J. (N. S.) K. B.* 157; 42 *R. R.*, 352.

INDIAN CASES.

(PRIVY COUNCIL DECISIONS).

Hindu Law—Testamentary gift of immovable property to a Hindu widow—"Malik", effect of the word—Interpretation in such a case, principle of—

Where the question was whether a Hindu widow acquired a right to alienate the property (immovable) in suit under a deed of gift or testamentary disposition of her late husband, wherein the word used was '*malik wa khud ikhtiyar*,' their Lordships held that in order to cut down the full proprietary rights that the word (*malik*) imports, something must be found in the context to qualify it, and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word '*malik*.'

The donee in the case of *Lalit Mohan Singh Roy v. Chukkun Lal Roy* (1897) *L. R.*, 24 *I. A.* 76, was a man, but the principles of interpretation laid down in that case were of general application—*Mussamat Surajmani v. Rabi Nath Ojha*, 7 *Calcutta Law Journal* 131.

Marriage—Presumption of its existence arising from co-habitation with habit and repute—Conditions precedent to its application—Practice—Point not submitted to either Court in India, raised before the Privy Council.

Before applying the general presumption of marriage arising from co-habitation with habit and repute, it is necessary to make sure that

there are the conditions necessary for its existence, *viz.*, first, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise, and second the habit and repute, which alone is effective, is habit and repute of that particular status which in the country, in question, is lawful marriage,

Their Lordships of the Judicial Committee were unable to entertain a point urged by the appellants having the same been submitted in the conduct of the case to neither Court below. *Ma Wun Di v. Ma Kin*, 7 *Calcutta Law Journal* 112.

MISCELLANY.

FULL FAITH AND CREDIT.—The Census Taker :

“Your name, mum?”

“I don’t know.”

“Beg pardon, mum.”

“I’ve been divorced At present my name is Mrs. Jones in this State. In several States it is Miss Smith, my maiden name, and in three States it is Mrs. Brown, my first husband’s name.”

“This your residence, mum?”

“I eat and sleep here, but I have a trunk in a neighbouring State, where I am getting a divorce from my present husband.”

“Then you’re married at present?”

“I’m married in Texas, New York and Massachusetts; divorced in South Dakota, Missouri, Alaska, Oklahoma and California; a bigamist in three other States, and a single one in eight others.”—*Chicago Law Journal*.—*The Green Bag*.

HIS OWN INTEREST.—A Richmond lawyer was consulted not long since by a coloured man who complained that another negro owed him three dollars, a debt which he absolutely refused to discharge. The creditor had dunned and dunned him, but all to no purpose. He had finally come to the lawyer in the hope that he could give him some good advice.

“What reason does he give for refusing to pay you?” asked the legal man.

“Why, boss,” said the darky, “he said he done owed me dat money for so long dat de interest had et it all up, an’ he didn’t owe me a cent.”—*Harper’s Weekly*.—*The Green Bag*.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 28TH FEBRUARY, 1908.

[No. 8.]

DRIVING FOUL AIR AGAINST NEIGHBOR'S WINDOWS AS NUISANCE.

One of those modern instances in which old principles are applied to a new state of facts is found in the recent case of *Vaughan v. Bridg-ham*, 193 Mass. 392, 9 L. R. A. (N. S.) 695, 79 N. E. 739. The suit was brought to enjoin the discharge across a passageway, and against the plaintiff's windows, by means of an electric fan, of a stream of air which was more or less heated and impure, and charged with offensive smells. The Court held that the defendants had a right to maintain windows and doors and other openings into and upon the passageway for light and air, and to ventilate into it by any proper means, if by so doing they do not create a nuisance. It held, further, that to cause a current of heated or impure air, or air charged with offensive smells, to strike upon the opposite window of the plaintiffs, was a nuisance in case the plaintiffs elected, as they had a right to do, to keep their windows open. It is obvious that life might be made miserable, and the use of premises made intolerable, by a forced blast of impure and foul-smelling air, if its impurities and foul odors were sufficiently bad. In such a case, it could not be well deemed anything less than a nuisance. But it does not follow that every slight current of air, even if it were not absolutely pure, would be deemed sufficiently objectionable to constitute a nuisance. Like most other cases of nuisance, it is deemed largely a question of degree. One prior case, quite similar to this, is that of *Ponder v. Quitman Ginney*, 122 Ga. 29, 49 S. E. 746, in which it was decided that one who used in a ginning plant machinery which separated dust and sand from cotton, and blew them in large volumes into the air and into the dwelling house of an adjacent owner, was liable in damages for an invasion of the neighbor's property rights. These cases are interesting not because of any new principle involved in them, but because, while the use of electric fans and air blasts has become common, these seem to be the first instances where legal liabilities growing out of them toward neighboring proprietors have been passed upon.—*Case and Comment.*

PROCLAMATION OF THE CRIER.

The court is set. The learned clerk looks wise.
 The sheriff nods, and now the crier cries :
 All persons who bring business here to-day.
 May hence depart, with all the speed they may.
 Let wit and laughter, quip and prank, and gird
 Come into presence, and they shall be heard !
 The court has ruled ; in high contempt are we
 If aught be spoke of motion, brief, or plea.
 This court will try cases more pleasing, far,
 Equity session, now, for Bench and Bar.
 The issue, now, is definite and clear.
 Penobscot bar versus these tables here,
 But ere we bend us to this royal sport,
 Leave being granted, we address the court.
 Our declaration : friendship, warm, sincere.
 Our plea : that you would make your dwelling here,
 Move to dismiss the care that business lends,
 But keep the count that counts us all your friends
 The jurisdiction of the court—attest
 One word, a word not spoke in jest,
 That bench where Appleton made justice—law,
 That bench where Peters spoke without a flaw.
 That robe that Wiswell honored first of all,
 And noble Woodard let untimely, fall.
 We, jealous, guard ; the readier, Cornish, we
 To see that bench, that robe, adorned by thee !
 We would amend, had we the words of art,
 Our halting brief, yet speaks it from the heart !
 Theu, brothers, stand ! The court : A toast ! A cheer !
 Do all in love, and keep the record clear !
 By Bartlett Brooks, Esq. *Read at dinner to Justice Leslie C. Cornish,*
Niben Club, Oct. 31, 1907. — The Green Bag.

ENGLISH CASES.

(Taken from *Select English Cases.*)

Arbitration—Umpire—Choice by tossing up—Subsequent acquiescence of parties.

Where arbitrators have decided the choice of an umpire by tossing up, the acquiescence of parties, subsequently to the choice, and before the reference is proceeded in, does not render the appointment valid unless the parties acquiescing have knowledge of all the circumstances under which the choice was made.

Therefore, where one of two arbitrators objected to S. as umpire, and afterwards the two arbitrators tossed up, and the other arbitrator won, and named S. and the attorney of one of the parties, knowing that

the arbitrators had tossed up, but not knowing that one of them had objected to S. proceeded in the reference, it was held that the irregularity was not cured. And this, though the ground of the arbitrator's objection to S. was negatived by affidavit. *In re Jamieson and Binus and Dean.* 4 Adol. and Ellis, 945: 5 L. J. (N. S.) K. B. 187: 43 R. R. 527.

Malicious Prosecution—Malice—Reasonable and probable cause—giving into custody.—Warning by a constable as to respectability of person arrested.

To support an action of malicious prosecution, there must be both malice in the defendant, and a want of reasonable and probable cause. Even if there be excessive malice, if it is combined with probable cause the action cannot be supported. So also, a total want of probable cause is sufficient evidence from which the jury may infer malice.

A having reasonable and probable cause for supposing that B made an assault on him with intent to rob him, went for a constable, who, on coming to the place, recognized B, and assured A that he was a respectable man, and that he would be answerable for his coming forward to meet the charge. A, nevertheless, persisted in giving B into custody, and on the following day preferred the same charge against him before a justice who dismissed it. In an action by B. against A for maliciously and without probable cause making such charge before the justice, the Judge stated to the jury that the plaintiff had reasonable and probable cause for suspicion in the first instance, but that he thought that on the explanation given by the constable, that reasonable and probable cause ceased, and that if the jury were of opinion that the defendant was satisfied with such explanation, but persevered in the charge from obstinacy or wounded pride, they should find for the plaintiff. *Held*, that this direction was wrong, for that, as the facts remained unaltered, the representation of the constable could not take away the reasonable and probable cause afforded by those facts. *Musgrove v. Newell.* 1 Meeson and Welsby, 582: Tyr and Gr. 957-2 Gale, 91: 5 L. J. (N. S.) Ex. 227: 46 R. R. 403.

INDIAN CASES.

PRIVY COUNCIL DECISIONS.

Muhammadian Law—Validity of gift—Murz-ul-mout—Right test to be applied—Practice where concurrent findings of fact are under consideration.

Where the question was whether a certain deed of gift made by a deceased Muhammadan donor in favour of his son was invalid by reason of the Muhammadan Law of *murz-ul mout* relating to gifts made in death illness, and the Courts in India concurred in finding in favour of the donee and applied the test which was treated as decisive on this point, "was the deed of gift executed by the donee under apprehension of death," their Lordships held that the test, which appeared to be the right question, was essentially one of fact, and upheld the concurrent findings of the lower Courts in favour of the donee.

Where the question is essentially one of fact and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, it would probably be enough to prevent their Lordships from interfering, if it should appear that there was evidence such as might justify either view, without any clear preponderance of probability. *Fatima Bibi v. Sheikh Ahmed Baksh*, 7 *Calcutta Law Journal* 122.

MISCELLANY.

A salutary decision in insurance law has been delivered by His Honour Judge Moss, at Holywell County Court. The plaintiff insured the lives of his cousin and aunt. Later on he took out fresh policies on the same lives. According to his evidence two agents of the company assured him the transaction was valid. Subsequently, however, he ascertained that the policies were not worth the paper they were written on, and he then sued the company not upon the policies, but to recover the premiums paid—some £29 odd. The policies had not matured. The learned judge found as a fact, that the company had received the premiums through the reckless misrepresentations of their agents, and it was upon the faith of those representations that the plaintiff had paid the premiums. Accordingly the company had no right to retain the money, for the company, even assuming that their agents in both cases had acted beyond the scope of their authority, could not be allowed to benefit by their misrepresentations, even if innocent. Not only had the company incurred no risk on the policies, which, on their own contention, were void, but they were actually holding money paid to them under those void policies on the strength of their agent's representations that they were all right. Judgment for the plaintiff accordingly for the amount claimed, with costs on Scale C.—*The Law Students Journal*.

An interesting question was under discussion the other day in the Divisional Court, touching the right of a County Court judge to decline to allow a witness to take the oath upon his own Testament. The County Court judge considered that there were only two courses open to the witness, viz., either to take the oath upon the court Testament, in many cases an evil-looking thing, highly suggestive of possible terrors, or else to take it in Scotch fashion, with uplifted hand. The Divisional Court considered that it would have been wiser had the County Court judge allowed the witness to have his way, upon his showing to the judge's satisfaction that the book was, in fact, a Testament, and we think that most people would readily agree with this view, and also that the course adopted by the witness was not altogether unreasonable or uncalled for.—*The Law Students Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

7TH MARCH, 1908.

[No. 9.]

INEFFECTUAL CHANGE OF THE BENEFICIARIES OF MUTUAL BENEFIT CERTIFICATES.

Upon the death of a member of a mutual benefit association who has made an ineffectual change of beneficiaries, the problem is presented whether the proceeds should be paid to the original beneficiary or to the persons designated by the society's rules or by statute to receive them if no beneficiary is named. The attempted change may be ineffectual because the second beneficiary is incapable of taking by the rules of the society or by statute, or because of failure to comply with the prescribed formalities. It should be noted that compliance with the formalities is not always necessary for an effectual change; for before the member's death the society can waive such compliance and complete the change, and the original beneficiary cannot object, since, unlike the beneficiary of an ordinary insurance policy, his rights vest only on the member's death.¹ If, however, the change is ineffectual for any reason, the important question then is, whether or not the act done operated as a revocation of the original designation. If the change attempted was in the nature of an assignment or one which, if ineffectual, leaves the original obligation payable on its face to the first beneficiary, the general rule is that he may recover.² There may, however, be grounds for equitable interference. If the cause of the invalidity of the change is attributable to the first beneficiary, he will not be allowed to profit by his own wrong, and the proceeds will be paid as though the change had been accomplished. The same result may be reached if the insured did all in his power to make the change but was prevented by death or because the conditions were impossible of performance.³ Unless some such exceptional case exists, the fact that the original designation has never been properly revoked will protect the first beneficiary.

If, however, there has been a sufficient revocation of the original designation, the rights of the first beneficiary are completely destroyed. A contrary result, it is true, has been reached in several cases which hold that although the original certificate was surrendered and a new

1. *Titworth v. Titworth*, 40 Kan., 571. Cf. *McLaughlin v. McLaughlin*, 104 Cal., 171.

2. *Elsey v. Odd Fellows*, etc., Ass'n, 142 Mass., 224.

3. *Grand Lodge v. Child*, 70 Mich., 163; See 16 Harv., L. Rev., 67.

one issued, as the second was invalid, the beneficiary named in the first should recover.⁴ This result, however, seems unsound. Since a certificate may be surrendered or revoked without a new beneficiary being named,⁵ it would seem that when the revocation is once complete all the beneficiaries' rights are for ever extinguished, and the issue of any later certificate, whether invalid or not, is immaterial. A recent case reaches this result, holding that when the new certificate is invalid the proceeds should be distributed as though no designation had ever been made. *Grand Lodge, etc., v. Markey*, 104 S. W. 907 (Tex., Civ. App.).⁶ The only possible theory on which a contrary result can be justified is on analogy to the law of dependent relative revocation of wills, where, in certain cases, when an attempt is made to substitute an invalid gift for a valid one, the Court will set aside the revocation and allow the old gift to stand. But the better view in such cases is that if the revocation is not really conditional, but absolute, although made because of the desire to change the legatee, the old gift will not be revived unless that result is clearly the intent of the testator.⁷ If equity would interfere only in cases where such proof is made, little objection could be made to an extension of the doctrine to the revocation of mutual benefit certificates. For the indiscriminate interference which has confused the law of both subjects there can be no excuse.—*Harvard Law Review*.

ENGLISH CASES.

(Taken from *Select English Cases*.)

Contract—Restraint of trade—Covenant by seller of business to serve as assistant to buyer for his life.

The plaintiff, by deed, sold to the defendants his trade and business as a carrier between London and Wisbech, and in consideration of the covenants therein contained on the defendants' part, covenanted with them that he would not thenceforth, during his life, exercise the trade of a carrier, except as thereafter mentioned, and that he would thenceforth, during his life, faithfully serve the defendants as an assistant in the trade of a carrier; and the defendants, in consideration of the before mentioned covenants, and of the plaintiff's faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against the defendants on this covenant: *held*, that the plaintiffs' covenant to serve during his life was good in law, and that the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defendants.—*Wallis v. Day*; 2 *Meeson and Welsby*, 273; *Mur and H.* 222; 1 *Jur.* 73; 6 *L. J. (N. S.) Ex.* 92; 46 *R. R.* 602.

Habeas corpus—Custody of child—Father's right—Father's adultery.

Where a person supposed to be improperly in custody is brought up on *habeas corpus*, the Court, if there appear no ground for restraint,

⁴ *Grace v. N. W., etc.*, Ass'n. 87 Wis. 562; *Smith v. B. & M., etc.*, Ass'n. 168 Mass. 213.

⁵ *Cullin v. Knights of Macabees*, 77 Hun (N. Y.) 6.

⁶ *Accord, Carson v. Vicksburg Bank*, 75 Miss. 167.

⁷ See *Tupper v. Tuppe*, 1 Kay & J. 665.

will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going. But if the party be a legitimate child, too young to exercise a discretion the legal custody is that of the father, and, if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up. Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so.

Semble, that the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption.—*Rez v. Greenhill*, 4 *Adol. and Ellis*, 625 ; 6 *N. and M.* 244 ; 43 *R. R.* 440.

Will—Revocation—Destruction by testator—Presumption where will last seen in testator's possession.

The rule of law is, that if a will be traced to the possession of the deceased, and last seen there, and is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The *onus* of proof in such cases lies upon the party propounding the will. —*Welch v. Phillips*, 1 *Moore P. C.* 299 ; 43 *R. R.* 83 ; 12 *Eng. Rep.* 828.

MISCELLANY.

Rumour has it that some important people are at last stirring in the matter of premature burial. The present system is most defective, and the Home Office have admitted that over 11,000 persons are annually buried without any medical certificate, and the medical certificate is granted in a perfunctory way, so that a much larger number must be buried without any certain evidence of death. It is a gruesome subject, but a risk which troubles many sane and clear-headed men. Many testators ask in these days for special clauses in their wills — *Law Notes*

Here is a puzzle to which we can find no satisfactory answer. Legal work has admittedly been slack and money tight, and yet 1907 saw a large increase in the number of law books published. Even allowing for the Workmen's Compensation Act and the new Companies Act, it is difficult to account for a jump from 98 in 1906 to 243 in 1907. We can only assume that new Acts mean new books ; whether they are bought or not appears to be immaterial. Old editions must be brought up to date.—*Law Notes*.

There exists, it is believed, only one woman judge in the world, and this unique honour in the annals of law belongs to Mrs. Catherine Waugh McCulloch, now Mrs. Justice McCulloch, of Evanson, America,

At the election, which took place some time ago, Mrs. McCulloch easily beat all her rivals for the honour of adding "Justice" to her name. There were many amongst the competitors who were of the sterner sex, but the people of Illinois had such regard for the lady that they sent her at the head of the poll to fill this important position.—*Law Notes.*

The following example of the gnawing of conscience which is said to make life a burden to those who offend against the laws of honesty is worth recording. An English sportsman travelling in Ireland had a five pound note stolen from him. A few months later he received the following letter:—"Dear Sir,—I stoled your money. Remorse naws my consence, and I send you a sovereign. When remorse naws agin I will send you some more. Tip O'Rary."—*Law Notes.*

A GOOD WITNESS.—Buzfuz: "Now, be careful Mr. Gibbins. You were, I believe, an old friend of the prisoner. Did you ever notice that he behaved strangely when he was alone."

Gibbins: "Well, sir, you see sir, I wern't never wid him when he was alone, sir."—*The Green Bag.*

HOW LAWYER GRAY STARTLED THE JUDGES.—A. D. Gray, the Preston lawyer, popularly known as Archie Gray, of the Republican State Central Committee, startled the sedate judges of the State Supreme Court this morning when, in arguing a damage case arising from interference with a water-course, he tragically exclaimed:

"God Almighty removed this barrier!"

And then he added;

"And he went on the stand and admitted it."

The Court was unable to find that this was proven by the record, however, though another witness had admitted it.—*St. Paul Daily News.*
—*The Green Bag.*

CANADA'S SUPREME COURT has fixed a maximum of three hours for counsel's addresses, which decree has recalled some tales of overlong speeches. The story is told of a counsel who pressed his argument for a long time with frequent repetition.

"Mr. ———," said the judge, "you have said that before."

"Have I, my lord?" replied counsel, apologetically. "I am very sorry; I forgot it."

"Don't apologize," was the judicial response, "it was so very long ago."

An American lawyer, who seemed unable to arrive at the end of a prolonged speech, at last ventured to express a fear that he was taking up too much time.

"Oh, never mind time," observed the judge, but for goodness sake, do not trench upon eternity."—*Buffalo Commercial.*—*The Green Bag.*

THE PUNJAB LAW REPORTER.

VOLUME IX.]

14TH MARCH, 1908.

[No. 10.

A NEEDED REFORM IN INDIAN ADMINISTRATION.

It is an axiom, and on the whole a true one, that we rule India more by the force of moral justice than by the force of arms. This being the case, it is of the utmost importance to remove occasions of injustice where they still exist. There is one reform which has been accepted in principle by Government, but which has been delayed year after year with increasingly serious effect. I refer to the separation of the Executive and Judicial Services. To show the magnitude of the present evil, I would mention a recent trial which was anxiously watched all over India. Daily reports of it appeared in every Indian paper. The trial was conducted by a Civilian Judge who had received no special legal training. He condemned one Hindu to death by hanging, and two others to transportation for life. The Hindu community was roused to a high pitch of excitement in the province, for the case had a political bearing, and it was felt that injustice had been done. An appeal was made to the High Court. The High Court in delivering judgment declared: (1) that the Civilian Judge was ignorant of law; (2) that the evidence for the prosecution was worthless; and (3) that the Judge himself had purposely withheld European witnesses who might have given evidence unfavourable to the prosecution. The last point is so serious that I give the Justices' own words:—"We have every reason to believe that Superintendent B—was purposely withheld from appearance at the trial." "The learned Sessions Judge directed an urgent telegram to be sent, 'don't start till you get orders,' and an urgent telegram was accordingly sent, and B—was not examined." The inference from the withholding of these witnesses is irresistible, that, if examined, they would not have corroborated M—" (the principal witness for the prosecution). The *Statesman*, the leading Anglo-Indian Calcutta paper, writes:—"We should not have cared to make this statement on our own responsibility, for it is tantamount to saying that the authorities took steps to prevent the disclosure of all the facts. But the charge has been made publicly from the Bench of the High Court."

The example I have given is only one of the very many serious miscarriages of justice which happen year by year through lack of a thoroughly efficient judicature. If, as I understand, the expense of

the proposed reform is the chief difficulty, then it should be clearly understood, both in England and in India, that no expense is too great at the critical juncture to remove the impression of unfair treatment, and that continual delay can only lead to increased irritation. By far the most alarming symptom of the present unrest has been the moral distrust which has increased among the educated classes. In all matters of reform affecting India, those should be first undertaken which will tend to restore moral confidence. *Rev. C. F. Andrews.*

VERIFYING THE DEPARTURE OF LIFE.

The *Law Times* gathers that an influential body of persons is interesting itself in the matter, and that an attempt is to be made next Session to deal with the dangers resulting from the present system of signing death certificates without some proper information being obtained to verify the departure of life. The fact that men of such hard headedness as the late Mr. Nobel and Sir Benjamin Ward Richardson have left explicit testamentary instructions as to their bodies being carefully examined before being disposed of, should suggest that the fear of pre-nature burial is not a mere fancy on the part of some hyper-sensitive individuals. Sir Mathew White Ridley, when Home Secretary, corrected an assertion in the *Lancet* to the effect that 15,000 persons were annually buried without a medical certificate by stating the hardly less serious number as 11,464 — *Indian Review.*

INDIAN CASES.

PRIVY COUNCIL DECISION.

Suit for redemption—Mortgage deed—Construction of the same—Compound interest—Maintenance—Costs—Enhanced Government revenue—Arrears of rent—The same statute barred or otherwise—Previous suit for possession—Account filed therein—Estoppel—Recovery of costs thereof—Practice—Point not taken before either of the Lower Courts—Whether the same was open before the Privy Council.

On the true construction of clause (4) of the mortgage deed, which provided "that in case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed, the mortgagee shall have immediately on such default, power either to recover the whole of the principal, interest, and (*Sud Mazid Munafa Maskura*) further interest on the said interest according to the rate herein fixed...; or the said mortgagee shall in default of payment of the instalment or instalments of interest on the said interest aforesaid take possession of the mortgaged property," their Lordships agreed with the lower Appellate Court that the mortgagor was not liable for compound interest since the mortgagee entered into possession of the mortgaged property.

Their Lordships upheld the concurrent finding of both the lower Courts, that under the mortgage deed in this case the mortgagee was

entitled to get from the mortgagor over and above the usufruct of the mortgaged property the amount paid by him on account of maintenance and enhanced Government revenue.

Under clause (10) of the mortgage deed in question, which provided that "whenever after the term of the mortgage or during the said term I (mortgagor) pay to the mortgagee in any *Khali jasl* (fallow season) i. e., in the month of *Jeth*, the whole of the mortgage money, and the whole of the interest, together with the Government revenue, arrears of rent and *takavi* advances, due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor, shall have power to redeem the mortgaged property," their Lordships agreed with the lower Courts that the mortgagee was entitled against the mortgagor to arrears of rent due from tenants even when such arrears were statute-barred as against the tenants.

The mortgagee brought a suit against the mortgagor, alleging that at the date of the suit there was due to him a sum of Rs. 33,087-13-3, and praying for a decree of possession of the property or in the alternative for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8 were due to the mortgagee at the date of the suit. The Court in giving judgment held that there was no necessity for passing an order to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It was contended by the mortgagee in a subsequent suit brought against him by the mortgagor for redemption of the mortgaged property that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on the date of that suit.

Held, by the Privy Council, who adopted the conclusion of the lower Appellate Court that nothing had occurred in the previous suit to raise an estoppel against the mortgagor, and, therefore, he might in the subsequent suit show, if he could, that under the terms of the deed compound interest was not payable.

The mortgagee was not entitled to recover the costs of the previous suit in the absence of any provision in that behalf in the mortgage deed.

A point not taken by a party before either of the lower Courts was not open to it at the time of the hearing of the appeal before their Lordships.—*Mirza Muhammad Abbas Ali Khan v. Muhammad Nasseem*, *Madras Law Times*, 1908, page 183 (P. C.)

MISCELLANY.

BUTLER WANTED THE BRIEF.—While E. C. Carrigan was in Gen. B. F. Butler's law office a lady came in to ask some advice. As the General was not in, Mr. Carrigan questioned her, and told her he would submit her case to the General, which he did.

The General was to leave the next day for Washington, and told Mr. Carrigan to prepare a brief of the lady's case and show it to him the next day.

Mr. Carrigan sat up half of the night writing his brief. The next morning, about 15 minutes before Butler was to take his carriage for the train, he told Mr. Carrigan he would look at his brief and give his opinion.

Mr. Carrigan began by saying: "General, I have made a most careful study of this case. I have the points all in my head, and can state them to you in three minutes."

"Let me have the brief," again said the General, somewhat sharply.

"But, General Butler," said Mr. Carrigan, "I had a brief prepared, and intended to show it to you, but I left it at home on my table. However, as I said, I have all the points of the case in my head."

"Young man," said the General, "the next time you have a brief to prepare for me bring me the brief, and leave your head at home on the table."—*Boston Herald—The Green Bag.*

FULLY ATTENDED TO.—Merchant: "Yes, we need a porter. Where were you last employed?"

Applicant: "In a bank, sir."

Merchant: "Did you clean it out?"

Applicant: "No sir. The cashier did that."—*T'it Bits—The Green Bag.*

We read in one of the papers that a New York woman is claiming a divorce because her husband limited her to six new hats in four years. Surely New York divorce law does not allow dissolution of a marriage on such inadequate grounds? If it had been the State of South Dakota we could have believed it.—*Law Notes.*

It is reported that as the result of a strike of lawyers the court of justice in the French town of Thonon, on the Lake of Geneva, has been closed for an indefinite period, notwithstanding the numerous cases awaiting judgment. The strike is said to have been caused by the circumstance that owing to the retirement of the last judge each of the lawyers has in turn been compelled for the past few months to discharge the judicial duties,—for nothing, we presume, otherwise it is difficult to see what the objection can be. We should not all mind temporarily performing a judge's duties—for a judge's salary.—*Law Notes.*

The Kingston-on-Thames Bench have been asked to state a case on the conviction of an automobile scout who gave warning of a police trap and was fined for obstructing the police in the execution of their duty. We should have thought that the point was covered by *Bastable v. Little* (see *ante*, Vol. XXV., p. 357), decided in 1906 by a Divisional Court, that a person who gives warning of a police trap does not obstruct the police in the execution of their duty. Evidently some new point has cropped up in the Kingston case which the daily press did not get hold of.—*Law Notes.*

THE PUNJAB LAW REPORTER.

VOLUME IX.]

21ST MARCH, 1908.

[No. 11.]

THE LAWYER AND THE LEGISLATOR IN AMERICA.

"Why are we here?" said the President of the American Bar Association—the Hon. A. Parker, LL. D., at its recent meeting. "We are here because we have ideals.....Only from the efforts of a people to attain high ideals can true progress result;" and he went on to claim that the lawyer in America does more for such true progress, the realisation of such ideals, than the legislator: Why? Because the aim of the lawyer is to emphasize those principles which, under the name of the Common Law, express the genius, the habits, and the customs of the people, which lie at the root of the national life, which fix the standard of justice, and so approximate more nearly to the national ideal than what Lord Campbell called "the crude enactments of the Legislature. In judge made laws, so called, the aim of both Court and of counsel is to work out this ideal of national justice, but to work it out by finding it, not by making it:

Not clinging to some ancient saw,
Not mastered by some modern term,
Not swift, nor slow, to change, but firm,
And in its season bring the law.

The function of the legislator is supplementary to that of the Judge. He strives, or should strive, to ascertain, to interpret, and to formulate the aspirations, the growing but undefined and imperfect efforts of a people to remedy the defects of their laws or customs: and this the legislator sometimes does successfully; more often he fails to do. Perhaps he misinterprets the will of the people; perhaps his objective may be right but his methods impossible; perhaps he pushes his Bill in the interest of a political organisation; perhaps he presents it in ignorance of his subject, to win applause or even unlawful gain. As an instance of the mass of mischievous legislation, the President of the Bar Association states that only this year the Governor of New York State felt himself constrained as a conscientious lawyer to veto not less than 484 Bills. No wonder that one of the ideals of the American Bar Association is to "elevate the standard of statute-making."—*The Journal of the Society of Comparative Legislation.*

CY PRES DOCTRINE IN INDIA.

A recent case in the Bombay Law Reporter, *re Hormasji Framji Warden*, contains a valuable judgment by Mr Justice Pavar on the application of the *cy pres* doctrine to charitable gifts. The gift in question was by a wealthy Parsee merchant for the erection of a "large, commodious and comfortable hall, for the purposes and use of Parsees professing Zoroastrian faith." For this object he bequeathed a sum of Rs 55,000 to trustees, with a further sum of Rs 10,000 for the upkeep of the hall. When, however, the trustees came to carry out the terms of the trust, and had purchased a site, they found the amount quite inadequate for the erection of a hall such as that contemplated by the testator; the only way in which the scheme could possibly be made practicable was by selling part of the land, letting the rest to a tenant, if any could be found, and accumulating the residue of the funds for a number of years. The discouraging feature of the situation was that by the general consent of the Parsee community in Bengal no hall was wanted; there were plenty already. What *was* wanted was a hospital for the benefit of the Parsee community, and the point was thus neatly raised, whether the Court would, under the *cy pres* doctrine, sanction the gift being diverted to an object different from that designated by the testator. On this point the English authorities give no very clear guidance. Lord Eldon, as might be expected, was for adhering strictly to the particular objects pointed out by the testator, but Mr. Justice Davar, after a very careful review of the authorities, sums up the result by saying that the Court will call in the assistance of the *cy pres* doctrine when it finds that the attainment of the original objects is *impracticable in fact*, or that it would be *impolitic* to carry out the original objects literally, so the hospital replaces the hall. This is a conclusion which strongly commends itself to common sense.—*The Journal of the Society of Comparative Legislation*.

ENGLISH CASES.

(*Taken from Select English Cases.*)

Life insurance—Void through misrepresentation—Premiums repayable by Company.

The plaintiff who had taken out a policy with an Insurance Company on the life of her brother, was induced to continue paying the premiums by statements made by agents of the Company, which they were not authorised to make, and which were in fact untrue; that at the end of five years she would get a free policy, and that she would then get out all she put in.

Held, that the Company were liable to repay to the plaintiff all the premiums which she had paid since the misrepresentations were made to her, on the ground: first, that the misrepresentations made the contract of insurance void; and secondly, that the Company could not retain the benefit of a contract which the plaintiff was induced to enter into by a misrepresentation, even though the agent had no authority to

make it. *Kettlewell v. Refuge Assurance Company*, (1907) 2 K. B. 242, 76 L. J. K. B., 711.

Negligence—Master and servant—Injury to servant—Driver of van—Condition of van—Whether implied warranty of condition by master.

Declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher, that the defendant had desired and directed the plaintiff so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servant, in carrying goods for hire upon a certain journey; that the plaintiff in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods, and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried: in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground and his thigh fractured. *Held*, on motion in arrest of judgment, after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van, but secondly, that, even in that case, the action was not maintainable. *Priestley v. Fowler*, 3 Meeson and Welsby 1: M. and H. 305; 1 Jur. 987; 7 L. J. (N. S.) Ex. 42: 49 R. R. 495: 19 R. C. 102.

Negligence—Overhead electric wires—Death caused by electric current.

The defendants were authorised by Act of Parliament "to construct under or over the streets of Montreal all such pipes, lines, conduits, and other constructions as may be necessary for the purposes of its business." The plaintiff's husband was killed by a current of electricity in consequence of contact of the derrick on which he was at work with the overhead wires of the respondents.

Held, that as the Act conferred alternative powers of constructing overhead or underground wires, there was no obligation on the defendants, on the ground of affording greater protection to the public, to lay their wires underground and not overhead.

Held, also, that in the absence of evidence that such a precaution would have been efficient, there was no negligence in the respondents in not insulating or guarding the wires. *Dumphy v. Montreal Light, Heat, and Power Co.*, (1907) A. C. 454: 76 L. J. P. C., 71: 23 T. L. R. 770.

INDIAN CASES.

PRIVY COUNCIL DECISION.

ChamPERTY—Assignment—Validity, if may be questioned by third parties—Consideration made payable upon success of suit—Gambling in litigation—Public policy—Purchase from limited owner—Hindu woman's estate—Onus on purchaser, extent of—Ratification—Contract Act (IX of 1872), Section 196—Sale without legal necessity—Recovery by reversioner—Mesne profits, claim for—

In India an agreement cannot be avoided on the ground of champerty. *L. R.*, 4 *I. A.*, 23; *s. o.*, *I. L. R.*, 11 *Cal.*, 233; *L. R.*, 20 *I. A.*, 112; *Q. C. W. N.*, 477; *a. c.*, *L. R.*, 32 *I. A.*, 113; *I. L. R.*, XXVII *All.*, 271, *followed*.

The agreement in this case provided that out of the purchase money which was fixed at Rs. 52,600, Rs. 600 only was to be paid down and the balance when the property should be recovered.

Held, that the agreement was generally of a champertous character, but was not void on that account, nor was it opposed to public policy and void as such by reason of the stipulation relating to the payment of consideration.

An assignment cannot be questioned as unfair and unconscionable by a person who was not a party to the assignment.

One who claims title under a conveyance from a Hindu woman with the usual limited interest which a Hindu woman takes, who seeks to enforce that title against reversioners is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that that alienation was justified by necessity, or at least the alienor did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

Ratification in the proper sense of the term as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier, and this rule is recognised in section 196 of the Indian Contract Act.

Where the defendant held possession of properties under deeds of sales from a limited owner, which were found to have been executed without legal necessity, the plaintiff's claim for mesne profits was allowed. *Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu*, XII *Weekly Notes*, Calcutta, 393 (*P. C.*)

MISCELLANY.

MOODS ILLUSTRATED.—The following is taken from Harper's Weekly :

"A member of the faculty of the University of Wisconsin tells of some amusing replies made by a pupil undergoing an examination in English. The candidate had been instructed to write out examples of the indicative, the subjunctive, the potential, and the exclamatory moods. His efforts resulted as follows : " ' I am endeavouring to pass an English examination. If I answer twenty questions, I shall pass. If I answer twelve questions, I may pass. God help me ! ' "—*Case and Comment*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

28TH MARCH, 1908.

[No. 12.]

LAWYERS AND LEGISLATION.

(BY A CORRESPONDENT).

We beg to offer a suggestion to the members of the Chief Court Bar Association Lahore and other similar Associations in the Province. We have felt it strongly for some time that it would be a distinct gain, if these Associations undertook from time to time, to express their opinions on the various measures that are placed on the legislative anvil. In the words of the Hon'ble Mr. Justice Karamat Husain, the latest addition to the Bench of the Allahabad High Court, uttered on the occasion of his taking his seat on the Bench for the first time, we may expect the members of the Bar Associations to see that the Government and the people "have the fullest benefit of your (Bar) great experience of human nature, of your extensive knowledge of the principles and practice of law and your genuine co-operation in the administration of justice," which the learned Judge added was to his mind "one of the noblest duties and privileges of man." Had the learned members of the Associations expressed themselves on the various legislative measures which some time back agitated the public mind, they would have done a real service to the cause of good administration. This leads us to another question which is hardly receiving the attention it deserves. In the draft scheme for the reconstitution of the Legislative Councils, it is pointedly mentioned that lawyers and teachers preponderate to the exclusion of representatives of other classes of the community and this defect is sought to be remedied by adding to the existing number. We are inclined to think that the Government is perfectly justified in looking to a proper representation of the various interests, but it can hardly be ignored that law-making is after all an art in which the lawyers alone happen to be initiated. The Legislative Council could hardly seem to be the place to serve as a school of training in law for people uninitiated in its mysteries, and it is certainly the last place for amateurs. Let all classes be represented in the Councils but knowledge of law should be marked as a qualification and not a disqualification. Throughout the civilized world including the United Kingdom of England and Wales lawyers are the most prominent members of all assemblies who have to make laws.

Whipping as a form of punishment.

The "Weekly Notes" Calcutta, contains the following about the Bill introduced in the Supreme Council to amend the Whipping Act:—

A Bill to amend the Whipping Act was introduced by Sir Harvey Adamson at a meeting of the Legislative Council of the Governor-General on Friday last. The Hon'ble member mentioned that an amendment in the Whipping Act (VI of 1664) had become necessary in view of the changes in public opinion regarding whipping as a form of punishment within recent years. We have noticed in these columns the progress of humane principles in criminal law in recent times and we are glad that they are finding recognition by the Indian Legislature. We cordially welcome Sir Harvey's enunciation of the principle that "whipping should be restricted to offences of a degrading nature and that it should never be administered when it is likely to outrage self-respect." A large number of offences for which the Whipping Act provided either an alternative ~~penalty~~ (sec. 2) or an additional punishment (secs. 3 and 4) have been excluded by this Bill. The object of the Bill evidently is to amend the provisions of the Indian law in conformity with the English law.

In English Law adults who may be convicted of robbery with violence may be punished with whipping. But ordinary theft is not so punishable. Sir Harvey, however, says that, having regard to the different conditions of prison life here, it has been considered desirable to include casual theft amongst offences punishable with whipping. But we would have thought that cases of casual theft, for which a sentence of imprisonment may not be considered desirable, may very well be dealt with under the provisions of the law for first offenders. We all know how the magistrates in this country, whether they be of first class or of lower grade, are reluctant to give effect to the humane provisions of the law. Also, having regard to the fact that the Bill leaves a large discretion in the hands of magistrates, who have already expressed their alarm at the proposed abolition of whipping as an additional punishment, it does not seem either wise or desirable to retain theft amongst offences punishable with whipping.

While we have nothing to say against the retention of whipping as an alternative or additional punishment for dacoity and robbery with violence and rape, we must say it passes our comprehension why assaulting or using criminal force to women with intent to outrage their modesty or unnatural offences, especially in cases of second convictions, should be put outside the pale of such punishment. It seems exceedingly anomalous that while even technical theft should be retained amongst offences punishable with whipping, repetition of offences of such loathsome character should be excluded. Property is surely not more sacred than honour of women.

The bill, while restricting the punishment of whipping to only a limited class of offences so far as adults are concerned, makes no alteration in this direction with regard to juvenile offenders. The only change in the law in respect of juveniles is that punishment in the

case of persons below the age of sixteen is not to exceed fifteen stripes. This is no doubt a change for the better. But it may be questioned why every offence not punishable with death should in the case of a juvenile offender be punishable with whipping. Sir Harvey Adamson advances the analogy of English law under which offences other than homicide are in the case of juveniles so punishable. But the law and practice differ widely in this respect in England. Since the practical discontinuance of flogging in the army, navy and public schools there has been a considerable revulsion of feeling in England regarding flogging as a form of punishment under criminal law. Magistrates in England do not resort to this brutal form of punishment lightly. They treat juvenile offenders with almost parental consideration. They are always anxious to make over such offenders to parents, guardians, teachers or clergymen for correction.

But the magistrates in India are far from considerate to juveniles. Cases of flogging are much more common here than in England. It is therefore very desirable that the Legislature should limit the class of offences for which a juvenile may be flogged and not leave it to the unlimited and undefined discretion of first class magistrates who are in this country not necessarily men of mature judgment or experience. It is no doubt contemplated in the Bill that the Government of India will have power to exempt by notification juveniles from flogging in respect of such offences as they please. But we do not believe in such legislation by notification. When the Government of India intend imposing such restrictions, it would be more satisfactory to embody them in the body of the Bill.

It is, however, gratifying to note that Sir Harvey recognises the fact that the educated and respectable classes in India consider flogging as a most degrading form of punishment, and we need only add, that the sentiment is not confined to adults but also extends to juveniles. Magistrates in India have been known to subject boys of respectable parentage to public flogging in cases where a mere reprimand or warning, or making over to parents or guardians for correction, would have sufficed. Such punishment is not only resented by the boy and his family but in fact by the whole of the Indian community. Being conscious of this Sir Harvey repeats in concluding that "it should never be inflicted when it is likely to outrage self-respect." We do not share his confidence in the good sense of the magistracy in this country, but we expect the High Court will issue well-considered instructions to the magistrates, as suggested by Sir Harvey, as soon as the Bill is passed into law.

ENGLISH CASES.

(Taken from Select English Cases).

Limitation—Extension of period—Sufficient cause—Mistake of counsel.

A mistake made by counsel of the party who is applying for an extension of the time for filing an appeal is not a sufficient ground

for extending it. The time may be extended in very special cases, such as where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself and a party was misled by an officer of the Court, or where some sudden accident, which could not have been foreseen—some sudden death or something of the kind accounted for the delay.

International Financial Society v. City of Moscow Gas Co., (1877) 7 Ch. D. 241, and *In re Helsby*, (1894) 1 Q. B. 742, followed.—*In re Coles and Ravenshear*, (1907) 1 K. B., 1; 23 T. L. R., 32; 76 L. J. K. B., 27.

INDIAN CASES.

PRIVY COUNCIL DECISIONS.

Decree upon a mortgage—Construction—Future interest to date fixed for payment.

When a decree directed payment of mortgage money and costs of the suit with future interest to the date fixed for payment.

Held, that the decree-holder was entitled to interest until realization. *L. R. 28 I. A. 35* and *L. R. 34 I. A. 9* followed. *Raja Gokuldas v. Sheth Ghasiram*, VII Cal. L. J. 233 (P. C.)

Muhammadan Law—Pre-emption—Talab-i-mowashibat and Talab-i-istishad—Unreasonable delay, a question of fact—Action for pre-emption—Claimants, co-sharers as well as mortgagees—Deposit of mortgage money in Court by purchaser—Withdrawal by claimants—Waiver of claim.

The right of pre-emption must be exercised, and the claims necessary to give effect to it must be made with the utmost promptitude, and any unreasonable and unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case.

The plaintiffs, in this case, claimed the right to pre-empt by reason of their having previously acquired a share in the property. They had also obtained the transfer of a *zurpeshgi* mortgage binding the share the sale of which was the occasion of the present suit. In the course of the suit the purchaser, defendant, deposited the mortgage amount in Court and the same was withdrawn by the plaintiff.

Held, that until a decree for pre-emption was made the purchaser owned the land, and had a right to redeem; and that the taking out of the money by the plaintiffs, as mortgagees was no recognition of any thing more than that, and was quite consistent with their claim to pre-empt. *Bajinath Gaenka v. Ramdhari Chowdhry*; XII Weekly Notes, Calcutta, 419 (P. C.)

THE PUNJAB LAW REPORTER.

VOLUME IX.]

7TH APRIL, 1908.

[No. 13.]

PAYING DIVIDENDS OUT OF CAPITAL.

It is trite law that dividends cannot be paid out of capital. But this statement does not exhaust the subject. What is capital in a legal sense? And how far can the Courts interfere with the decision of the directors as to what sums are properly charged to capital, so as to leave free sufficient income to pay dividends?

This latter question arose first in *Bloxam v. Metropolitan Railway Co.*, (1868) L. R. 3 Ch. 337, in which the Court laid it down that the payment of dividends will be restrained in cases of doubt as if paid they are irrecoverable from the shareholders. The discussion in the judgment is important as pointing out that the charging to capital of interest on debentures may be proper if the debentures were those of a separate company, *i. e.*, guaranteed as to principal and interest by the operating company, but not so if the undertakings were merged and, as a whole, were producing an income.

Again in *Stringer's case* (1869) L. R. 4 Ch. 475, the directors of the company were held justified in taking the facts as they actually stood and in declaring a dividend out of realized profits, though some of the ships were lost—(the company was formed to run the blockade during the Civil War in the United States)—and the assets shown depended for their value upon possible realization in an extremely hazardous business. In fact the Courts assert that if they laid down the rule that there must be actually cash in hand or at the bankers of the company to the full amount of the dividend declared, that rule would be inconsistent with the custom of the companies, and at variance with mercantile usage. The principle accepted is that in the absence of fraudulent intent the Court ought not to be astute in searching out minute errors in calculation in accounts honestly made out and openly declared.

In *Rance's case* (1870) L. R. 6 Ch. 104 the Court of Appeal, Sir Wm. James and Sir Geo. Mellish, L. JJ., discuss the duties of directors in declaring a dividend. In the first place a balance sheet is necessary, and if that is made out accurately and submitted, or even if the directors arrive at their conclusion by placing unfounded reliance upon the representations of their servants or actuaries, "the

Court will not sit as a Court of appeal upon that conclusion, although it might afterwards be satisfactorily proved that there were a great many errors in the accounts which would not have occurred if they had been made out with greater strictness or with more scrutinising care."

In the view of the Court no proper balance sheet was made out, in that no proper provision was made for risks (in the insurance sense) in regard to money received from another company for whom they had guaranteed certain policies.

In re Oxford Benefit Building & Investment Society (1886) L. R. 35 C. D. 502, the directors never submitted an account of income or expenditure nor any profit or loss account. But they paid dividends out of estimated profits and out of whatever money they happened to have in hand, without attempting to form a reserve fund or to provide for possible bad debts, losses or expenses and without ascertaining what profits were actually realized or out of what fund the dividends were actually paid.

The company were only entitled to pay dividends out of "realized profits." Kay, J., held that profits were not "realized" by estimating the value, for the time being, of the instalments of principal and interest remaining unpaid by each mortgagor. He decides that realized profits out of which dividends can be paid must be either cash in hand or "rendered tangible for the purpose of division." In *Leeds Estate Co. v. Shepherd* (1887) 36 C. D. 787 Stirling, J., held that the Articles of Association warranted the payment of dividends out of estimated profits arrived at upon estimates of the company's accounts, and he indicates that directors may properly act upon valuations of their properties in proposing a dividend. His reference to *Stringer's case* (ante) at pp. 801-2 is liable to misconstruction. The question in that case was as to dividends during the company's career and not after its complete winding-up. The quotation from the remarks of Gifford, L. J., that dividends might be paid "out of profits, although those profits were not profits in hand" refers obviously to profits in hand as meaning those ascertained after all the company's operations were concluded (see page 491) because the article mentioned as authorizing the payment of dividends (page 490) expressly says "as soon and as often as the profits of the company in hand are sufficient," *i. e.*, in hand from time to time upon a proper estimate of the company's accounts. In *re Sharpe* (1892) 1 Ch. 154 emphasis is put by North, J., upon the necessity of directors having a proper profit and loss account made out and in seeing that that account contains what is essential for the purpose of ascertaining whether or not there is a profit. In that case interest had been paid upon the amounts paid up on the shares, and the Court of Appeal, while thinking that it was doubtful whether, under the articles, interest must be paid only out of profits, held that payment of interest when there were no profits was a misapplication of the assets of the company and was *ultra vires*, *i. e.*, an act beyond any power which the company could confer upon its directors. It was in effect a return of part of the capital to the

shareholders and authorization in the Articles of Association to do so would be invalid. This view is founded upon *Trevor v. Whitworth* (1887) 12 A. C. 409, where Lord Herschell says (p. 415): "The capital may be diminished by expenditure upon, and reasonably incidental to, all the objects specified. A part of it may be lost in carrying on business operations authorized. Of this all persons trusting the company are aware and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders."

In *Bolton v. Natal Land and Colonization Company* (1892) 2 Ch. 124, and in *Wilmer v. McNamara* (1895) 2 Ch. 245, an injunction was refused even where a *bona fide* dispute existed as to the proper amount to be charged for depreciation against the year's profits when the directors had honestly exercised their judgment.

The case of *Burland v. Earle* (1902) A. C. 83 determines some practical questions. It is there held that, under the Letters Patent, granted under the old Companies Act, a company (1) is not bound to divide all its profits on each occasion among its shareholders, (2) can legally reserve any portion of it at its own discretion, (3) may invest such sum as may be selected by the directors subject to the control of a general meeting, but not restricted to trustee investments and (4) may invest in the name of a sole trustee. These statements of law are not confined to the case of companies under the Act referred to, but are laid down as applicable generally to joint stock companies in the absence of special restrictions by charter.

These are matters of internal management, and, as stated by Lord Davey, "it is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so."—*Canada Law Journal*.

(To be continued)

ENGLISH CASES.

(Taken from *Select English Cases*).

Contract—*Printing press and quiet bedrooms*—*Building schemes*
—*Common intention*—*Failure in one portion*—*Right of action by party affected*.

Where a contract has been entered into and a scheme made for carrying out two purposes which turn out to be incompatible with each other, neither party has any remedy against the other in respect of damage sustained by the execution of the scheme where nothing has been done or omitted which was not contemplated by both parties.

The plaintiffs and the defendants agreed upon a building scheme with the intention that the building should be used for bedrooms,

and also for a printing house, according to a design agreed upon, under the common anticipation that there would be no appreciable interference with the comfort of the bedrooms from the nearness of the printing works, which anticipation, however, was not fulfilled.

Held, that as the common intention was that the plaintiffs should have reasonably quiet bedrooms and the defendants should keep on printing, and as that intention could not be bisected, no action by the plaintiff would lie for injunction and damages.—*Lyttelton Times Co. v. Warners*, (1907) A. C. 476; 76 L. J. P. C. 100; 23 T. L. R., 751.

Limitation—Extension of time—Mistake of legal adviser.

Where a litigation has been adjudicated upon, the successful litigant has upon the termination of the time allowed for appealing, a vested interest in his order of which he ought not, in the absence of special circumstances, to be deprived; and the mere fact that the litigant's legal advisers thought that he could not appeal, was not a special circumstance justifying a departure from the rule. *In re Coles and Ravenshear*, (1907) 1 K. B. 1; 23 T. L. R. 32, followed.—*Nicholson v. Piper*, 24 T. L. R., 16.

MISCELLANY.

A PROMISE TO PAY.—"A merchant in a Wisconsin town who had a Swedish clerk, sent him out to do some collecting. When he returned from an unsuccessful trip he reported :

" 'Yim Yonson say he vill pay ven he sells his hogs. Yim Olsen, he vill pay ven he sell him wheat, and Bill Pack say he vill pay in January.' "

" 'Well,' said the boss, 'that is the first time Bill ever set a date to pay. Did he really say he would pay in January? '

" 'Vell, aye tank so,' said the clerk. 'He say it ban a dam cold day ven you get that money. I tank that ban in January.' "—*Harper's Weekly—Case and Comment.*

A MODERN FINANCIER.—During the financial flurry, A German farmer went to the bank for some money. He was told that the bank was not paying out money, but was using cashier's cheques. He could not understand this, and insisted on money. The officers took him in hand, one at a time, with little effect. Finally the president tried his hand, and after a long and minute explanation some intelligence of the situation seemed to be dawning on the farmer's mind. Finally the president said : "You understand now fully how it is, Hans, don't you?" "Yes," said Hans, "I tink I do. It's like dis, aindt is? Ven by baby vakes up at night and vants some milk, I gif him a milk ticket."—*Case and Comment.*

THE PUNJAB LAW REPORTER.

VOLUME IX.]

14TH APRIL, 1908.

[No. 14.

PAYING DIVIDENDS OUT OF CAPITAL.

(Continued from page 51).

Turning now to the question of how profits are to be determined and how far capital, fixed or circulating, must be made up or depreciation allowed for before profits are available for dividend, the following cases are to be considered.

In *re Ebbw Vale Steel Iron & Coal Co.*, (1877) 4 C. D. 827 Jessel, M.R., inclines to the opinion that a limited company could not pay dividends unless its paid up capital were kept up.

In *Bouch v. Sproule*, (1887) 12 A. C. 385 the use as capital of accumulated profits by companies having no power to increase their capital was considered. It was there determined, following *Irving v. Houstoun*, 4 Paton Sc. Ap. 521, that any distribution from those accumulated profits must be taken, as between a remainderman and life tenant, as a distribution of capital. But as stated by Lord Herschell this determination in no way affects the power of a company, which has the right to increase its capital and to appropriate its profits to such increase, to distribute these profits as dividends when it has not appropriated them to capital.

Lee v. Neuchatel Asphalte Company, (1889) 41 C. D. 1 contains some very interesting views as to capital. It was there pointed out that capital may mean either the share capital or the assets of the company in which that share capital is invested. While, therefore, the share capital cannot be decreased except as provided by the Companies Act, the value of the assets may fall and it is not incumbent on the company to maintain the value of the assets at the original figure before it can pay dividends. Where property is taken over for shares and the shares are thereby paid up it is obvious that the property so taken may increase or diminish in value. Accretions to capital are capital and not divisible profits. In determining profits, according to Lopes, L. J., (p. 27) accretions to and diminutions of the capital are to be disregarded. And the share capital, paid in cash, may, according to Lindley, L. J., (p. 22) be sunk in getting a business, *e. g.*, a company to start a daily newspaper may expend £ 250,000 before

the receipts from sales and advertisements equal the current expenses. This expenditure is proper if it is in accordance with the Articles of Association or charter of the company. Cotton L. J., (p. 17) endorses this view. Lindley, L. J., points out three conclusions from a consideration of the Companies Act. First that capital is not required to be made up if lost, second, that it is not provided that a Company shall be wound up if the capital is lost, because if the debts are paid the company may go on and divide profits if the shareholders are satisfied, and third, that there is nothing in the Companies Act defining what must be considered as capital and what as profits. Of course if the charter requires provision for reparation or depreciation (as in *Davison v. Gillies*, (1879) 16 C. D. 347 n.) or that the dividends are to come out of the profits of the year (as in *Dent v. London Tramways Co.*, (1880) 16 C. D. 314), then those are proper charges to be made and must be made before profits can be ascertained for division. It must be observed, however, that in the latter case, which the Lords Justices say was decided solely upon the Articles of Association, Jessel, M. R., expressly decides that "profits for the year" mean the surplus in receipts, after paying expenses and "restoring the capital to the position it was in on the 1st of January of that year."

This case forms the starting point for a line of cases referred to below, which are criticised in Palmer's Company Law, 4th ed., p. 178, as laying down conclusions which the author considers remarkable. And in *Dovey v. Cory*, (1901) A. C. 477, Lord Halsbury (pp. 482, 486), Lord Macnaghten (p. 487), and Lord Davey (pp. 493-4), expressly reserve their opinion upon the reasoning of the Court of Appeal in regard to the method of arriving at profits until a concrete case came before them for their decision.

And in a case noted below, *Bond v. Barrow Hematite Co.*, (1902) 1 Ch. 353, Farwell, J., considers the decision of *Lee v. Neuchatel Asphalte Co.* as confined to some and not all companies having wasting assets.

Bolton v. Natal Land Company, (1892) 2 Ch. 124 is authority for the proposition that if profits are made in any one year, then, notwithstanding the depreciation of the company's assets and consequent loss of part of its share capital, those profits may be divided without providing for depreciation even although in former years the company has charged depreciation of assets against profits.

This case is noted by Lindley, L. J., in *Verner v. General, etc., Trust*, (1894) 2 Ch. at p. 267, as depending upon the fact that there is no law which compels limited companies in all cases to recoup losses shewn by capital account out of the receipts shewn in the profit and loss account.

In *Lubbock v. British Bank of South America*, (1892) 2 Ch. 198, Chitty, J., held that a sum of £205,000 profit remaining after a sale of part of its business in Brazil by a banking company, after deducting the paid-up capital and other incidental expenses was

profits on capital and not capital. His argument was that where a company was a trading company everything made by the sale of its stock in trade was, after deducting the share capital, clear profit and that the capital to be regarded is the capital according to the Companies Act and not the things for the time being representing the capital in the sense of being things in which the capital has been laid out. He distinguishes *Lee v. Neuchatel Asphalte Co.* in that that company was formed to work a wasting property and hence was, apparently, not bound to keep up the value of its share capital before dividing profits.

In *Verner v. General and Commercial Investment Trust*, (1894) 2 Ch. 239, one of the abstract questions discussed in *Lee v. Neuchatel Asphalte Company*, (1889) 41 C. D. 1, came up in concrete form before Stirling, J., and the Court of Appeal. The case is put thus very tersely by Stirling, J., (at p. 245): "There being a loss in respect of capital of not less than £75,000 and a gain in respect of receipts over expenditure of £23,000, can a dividend be declared?" Lindley, L. J., having stated that capital means, in contrast to dividends or profits, money subscribed pursuant to the memorandum of Association or what is represented by that money, asserts (p. 266) that although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. He then cites three instances of improper payments, (1) out of receipts without deducting expenses, (2) out of borrowed money, and (3) out of the income produced by the consumption of what he calls "circulating capital." Kay, L. J., alludes to the difference between a company making its profits on the purchase and sale of stocks, etc., and a company such as the one he was dealing with which had merely the right to invest, and whose profit was only the interest on such investments.

In the one case the capital must be kept intact before profit can be shewn; in the other it may be lost by depreciation in the investments, which, however, may yield a yearly profit, distributable in dividends.—*Canada Law Journal*.

(To be continued).

INDIAN CASES.

PRIVY COUNCIL DECISION.

Native State, location of British troops in—Power of Cantonment authorities as to grant or user of land—Treaty, absence of—Power restricted to military purposes—and belongs to State—Parsi Tower of Silence, grant of land for—Control of Cantonment authorities.

The Hyderabad Subsidiary Force, which had its headquarters in the Secunderabad Cantonment, was a force in the employment of the East India Company and commanded by the Company's officers, but

maintained, by agreement, in Hyderabad territory for the protection of the Nizam. There never was in existence any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the military commander commanding the Hyderabad Subsidiary Force on the other, with respect to the management, control, and disposition of the Cantonment and the land comprised in it. When the Nizam's Government admitted a British force within its territory, and allotted to it Secunderabad Cantonment as its head-quarters, it, no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control and management incident to maintaining the efficiency and the discipline of the troops, the peace and good order and convenient use of the Cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops was empowered to alienate, in perpetuity, land forming part of the Cantonment and undoubtedly Hyderabad territory for a purpose wholly unconnected with military requirements.

The appellants, who were members of the Parsi community, claimed that the founders of the Parsi Tower of Silence, which stands on a portion of certain land situated in the Secunderabad Cantonment, were in their lifetime owners of the land in question, and that the property had devolved upon themselves as descendants, and representative in title, of the original founders. The respondents, who were also members of the Parsi community, contended that the land in question had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of the community generally for all time by the Cantonment authority. The most important document relied upon by the appellants was issued by an officer of the Hyderabad State and purporting to express a transaction, by which the State had assented to the grant of the land in question to the founders, and directed possession of it to be delivered to them. Another document in evidence also obtained on behalf of the founders, through their agent, purported to be issued by the authority of the Brigadier commanding the Hyderabad Subsidiary Force, and to certify that the Parsis of Secunderabad had permission to enclose the land in question, which was given for a tower to be built on it.

Held, that the considerations set out above must be borne in mind in estimating the effect of the two documents ; that the first, emanating from the State, purported to deal with, and enforce, a grant of the land to the founders by name, and the delivery of possession to them ; that the second document, emanating from the Cantonment authorities, did not deal with title or possession, but gave permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land, which were matters obviously within the discretion of the commanding officer, and that the effect of the two documents was to show a good title in the founders, and not in the Parsi community.—*Pestonji Jivanji v. Shapurji Edulji Chinoy*, XII Calcutta Weekly Notes, 465 (P. C.)

THE PUNJAB LAW REPORTER.

VOLUME IX.]

21ST APRIL, 1908.

[No. 15.]

PAYING DIVIDENDS OUT OF CAPITAL.

(Continued from page 55).

In *Wilmer v. McNamara*, (1895) 2 Ch. 245 Stirling, J., followed the *Neuchatel and Verner cases* in the case of a company carrying on business of a carrier, the loss of capital not having occurred from the company receiving a price less than it originally gave for a portion of its assets. Depreciation of goodwill is treated by the learned judge as a loss of fixed capital. In *re London and General Bank*, No. 2 (1895) 2 Ch. 673, dividends paid out of borrowed money were held to be improperly paid.

Vaughan Williams, J., in *re Kingston Cotton Mill Co.*, No. 2 (1896) 1 Ch. 331, follows the *Neuchatel and Verner cases* and holds that a trading company as well as an investment company and a company formed to work a necessarily wasting property, may lawfully pay a dividend out of current profits without setting aside a sum sufficient to cover depreciation in the value of fixed capital.

Re National Bank of Wales, Limited, (1899) 2 Ch. 629 is an interesting case upon the charging up of bad debts of successive years. Wright, J., considers that as bad debts had wiped out the paid-up capital, leaving a deficiency of £41,000, he was justified in holding that the dividends in question were paid out of capital. His view, however, was not adopted by the Court of Appeal. Lindley, M. R., while admitting the fact that omitting to write off bad debts year by year, would inevitably lead to disaster, contends that such a course must not be confounded with paying dividends out of capital. He says that what losses can be charged to capital and what to income must be left to business men to determine. All debts cannot be charged to capital, but there is no hard and fast rule on the subject. He explains what is meant by circulating capital as being the money employed in earning returns and this must first be deducted from the returns in order to ascertain profits. The result of his view is that leaving bad debts as a charge against capital and thus diminishing it yearly does not, in law, affect the question of whether profit, *i. e.*, the excess of income over expenditure is or is not, in fact, made, and that a banking company is not bound to keep its capital intact, as such a

company lends its capital and may, therefore, lose it. And in appeal, as stated above, the House of Lords expressly decline to assent to all the propositions laid down by the Court of Appeal in this case.

In the case of *Bosanquet v. St. John del Rey*, (1897) 77 L. T. 207, the view of the Court of Appeal was followed.

Cozens-Hardy, J., in *re Barrow Hæmatite Steel Co.*, (1900) 2 Ch. 846, refers to the *Neuchatel and Verner cases* as establishing that a trading profit may be applied in payment of dividends, notwithstanding a depreciation in the fixed capital of the company.

In *Bond v. Barrow Hæmatite Co.*, (1902) 1 Ch. 353 the company had bought collieries and mines and erected blast furnaces and cottages. By the surrender of certain leases the pulling down of blast furnaces and the sale of cottages, a loss had been incurred. Farwell, J., held that these assets were "circulating capital" and must be made good before dividends were paid, and illustrates his view by saying that if a company had bought out of capital the last two or three years of a valuable patent, they would, in his view, be bound to replace that capital before dividing the receipts as profits.

In *Foster v. New Trinidad*, (1901) 1 Ch. 208 Byrne, J., deals with a question said to be involved in *Lubbock v. British Bank of South America* (ante), which dealt with the distribution, as profits, of a balance on the sale of part of the bank's assets after deducting the capital and expenses.

The defendants, in this case, bought out the assets of an old company and unexpectedly realized upon one which was considered valueless. Byrne, J., while expressing the view that it was capital, as being part of the capital assets of the old company (a result which, by the way, does not seem to follow when it is being dealt with as purchased asset of the new, and not as a capital asset of the old company) did not finally determine the point. His view was that as an appreciation in the total value of capital assets, if realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for the purpose of dividend, this windfall might be taken into the accounts for the year, but could not be treated as available for dividend without reference to the whole accounts, fairly taken, capital as well as profit and loss.

But since the House of Lords, in that case, reserved its opinion upon the question of the replacement of capital before profits are divided the reasoning in some of the cases given above has been canvassed.

The authors of *Lindley on Companies*, 6th ed. (1902) p. 600, regard the question as one on which it is at present impossible to lay down any general principle which will apply to all cases. They regard the expressions of opinion in the *Verner case* as requiring caution in their application and as needing, possibly, modification where a definite portion of the company's fixed capital has been lost.

In the *Encyclopedia of the Laws of England*, p. 201, it is said that while a company is not bound to carry on business in perpetuity, yet the so-called profits in case of a company working wasting property are profits only in a conventional sense, that is, are agreed between the shareholders to be treated as such and are not profits in the ordinary sense, and that it is difficult to see why dividends out of such conventional profits are not really a return of capital to the shareholders. It is to be observed that in some of the later cases the question is treated as if the judges were not wholly persuaded by the authority which they were bound to follow. For example, Vaughan Williams, J., in *Re Kingston Cotton Mills Co.*, No 2 (ante) does not profess to express an opinion upon the principle of the *Neuchatel and Verner cases*, and Farwell and Stirling, JJ., cannot be said to have fully accepted it.

In Buckley on Joint Stock Companies, 8th ed., 1902, p. 584, *et seq.*, the two leading cases and others are analysed and explained. The author emphasizes the fact that all the cases are reconcilable upon the principle that approval or disapproval depended upon the provisions of the Articles of Association.

If companies are authorized by their charter to acquire and work a wasting property, then, if they sink their capital in that class of property and make other property by working it, the depreciation, being incident to the exercise of their powers is not necessarily a charge on revenue account, but may by their charter be thrown on capital. The destruction of the company's capital is within its objects and is therefore legitimate. If the company is authorized to make investments, which it does, and these depreciate, the same rule applies. If this be the real test the cases of *Bolton v. Natal Land Co.*, (1892) 2 Ch. 124; *Wilmer v. McNamara*, (1895) 2 Ch. 245, *Re Kingston Cotton Mills Co.*, No. 2, (1896) 1 Ch. 331, and *re Barrow Haematite Steel Co.*, (1900) 2 Ch. 816 may be said to be consistent with it. The difficulty is apparent, however, if the capital is not fixed but is circulating, because that capital must be first secured before any profit can be said to be earned.

If a bank lend its capital and lose it, is it fixed or circulating capital? Depreciation is a deduction from the value of property remaining in use and is properly applied to fixed capital. But how does it differ in principle from losses on investments or losses on circulating capital?

It must be admitted, as Lord Halsbury says in *Dovey v. Cory*, that the question of what is capital and what are profits is difficult and perhaps insoluble. To be quite safe capital should be replaced before profits are paid. But in all cases circulating capital must be made good, and in the opinion of some of the most eminent judges fixed capital must also be made up. The extreme difficulty of laying down any rule may be seen by comparing the definitions of "circulating capital." John Stuart Mill and Prof. Marshall distinguish "circulating

capital," which fulfils the whole of its office in the production in which it is engaged by a single use, from fixed capital which exists in a durable shape and the return from which is spread over a period of corresponding duration. Buckley defines circulating capital as property acquired or produced with a view to re-sale or sale at a profit, and Lord Lindley considers it equivalent to any money employed in earning returns.

In Canada it may be said that some of the reasoning in the cases referred to is not applicable. The words in the Canada Companies Act and in the Ontario Companies Act are not the same as those in the English Companies Act. By the latter, dividends must not be paid out of profits. Hence the question has continually arisen, what are "profits"? In this country no dividend can be paid "which renders the company insolvent or impairs the capital stock thereof" (Canada), and no dividend can be paid "which renders the company insolvent or diminishes the capital thereof" (Ontario). It seems reasonably clear that if by any loss of fixed capital the company would be rendered insolvent, unless enough were carried from revenue account to replace it, no dividend could be paid till the capital was restored sufficiently to make the company solvent. But it is also obvious that if fixed capital be lost but the company is not insolvent, the payment of a dividend out of profits on the year's business will not impair or diminish the capital stock. But in the case of circulating capital, unless that is made good, a payment may render the company insolvent or may diminish its capital.

Insolvency or impairment of capital are made the tests, not the actuality of realized profits, and it would seem that the line of cases beginning with *Lubbock v. British Bank of South America*, (1892), 2 Ch. 198, in which the position of accretions to capital are discussed, would have no bearing on Canadian questions. But the general principles laid down in the English cases may very well be adopted by business men, and are applicable to many concerns where both fixed and circulating capital enter into the balance sheet. Profits are defined by a learned text writer as the credit balance of a profit and loss account, properly prepared, having regard to the definition of the business in the Articles of Association or Charter, and it is easy to see what difficulties lurk in the words "properly prepared." FRANK E. HODGINS—*Canada Law Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

28TH APRIL, 1908.

[No. 16.]

THE TERRITORIAL EXTENT AND SITUS OF TRADE-MARKS.

Relief from infringement of trade-marks or trade-names is usually given upon one of three principles : judicial recognition that the user has become invested with a property right in the mark or name ; ¹ the presence of features of unfair competition ; ² or deception of the public as to the origin of the goods. ³ The courts recognize a property right in such marks only as are mere arbitrary symbols or in such names as are fanciful and in no way descriptive of the article. If the mark or name is descriptive, unfair competition must be shown. The reason for this distinction lies in the fact that if the originator of the symbol or fanciful name has invented and applied to his goods a mark indicative of its origin which has never before been used, he is entitled to a property right in it. ⁴ But where the name is descriptive he can acquire no title, since the property right is already in the general public. ⁵ But given a case where the user has acquired a property right in the mark, is such right limited by any geographical boundaries ? It is sometimes said that no such restriction exists. ⁶ By the better view, however, this statement must be modified. It is well settled that a trade-mark can have no existence apart from the business with which it is connected and cannot be assigned apart from such business. ⁷ It must, therefore, be restricted within the territorial scope of the business. Moreover, upon principle it would seem that, the property being a mere monopoly created by law, no extra-territorial effect can be given such law. ⁸ Thus a right acquired by one person in Germany is of no avail as against a *bona fide* user of the same mark in America. ⁹ There seems to be no direct authority as to the situs of this property right in a trade-mark or trade-name, but, since it is inseparable from the business, the situs must be the place where the

1 Bass v. Feigenspan, 96 Fed. 206.

2 Shaver v. Heller, etc., Co., 108 Fed. 821.

3 Samuel v. Berger, 24 Barb. (N. Y.) 163.

4 Browne, Trad-Marks, 2 ed., § 46.

5 See Helmbold v. Helmbold, etc., Co., 53 How. Pr. (N. Y.) 453, 458.

6 Derringer v. Plate, 23 Cal. 292.

7 See Congress, etc., Co. v. High Rock, etc., Co., 57 Barb. (N. Y.) 526, 551.

8 See Vacuum Oil Co. v. Eagle Oil Co., 122 Fed. 105.

9 Richter v. Reynolds, 59 Fed. 577.

business is carried on. It follows that when the business is conducted in two countries, there must be two distinct property rights existing independently in each country.

These conclusions are well illustrated by a recent federal decision. The plaintiffs had been engaged in France in the manufacture of a liqueur which they called "Chartreuse," and the product had been sold under that name for a number of years in this country. The French government confiscated the plaintiff's property, and the trade-name in question was transferred to the defendants. The plaintiffs removed to another country and continued to use the name. The defendants were enjoined from using the trade-name in the United States.¹⁰ *Baglin v. Cusemier Co.*, 156 Fed. 1016 (Circ. Ct., N. D. N. Y.). The court found that "Chartreuse" was a valid trade-mark, not a mere descriptive word. The plaintiffs were therefore possessed of two property rights, one situated in France and one in America, and as confiscation can only affect such property as can actually be seized,¹¹ the American property right remained in the plaintiffs. The decision may also be supported on the third ground upon which protection is granted, that the acts restrained amounted to a fraud on the public. Moreover, the business of the plaintiffs did not pass to the defendants, since the recipes for the manufacture were not disclosed. Therefore no property passed, and the confiscation merely amounted to a declaration merely amounted to a declaration that it was not unfair competition for the defendants to use the words. This, of course, was of no extra-territorial effect.—*Harvard Law Review*.

REMUNERATION FOR LEGISLATION.

The following table of payment to members of legislative bodies throughout the world is taken from the *Liberty Review* :—

Great Britain.—Nothing.

America.—For the Federal Legislature, about £1,400 a year, with an allowance of £25 per year for stationery. Ten pence per mile is also allowed once in a session for travelling from his home by the most direct route. For the State legislators the pay ranges from 6s. to 30s. per day while the House is in session, and travelling expenses.

Canada.—The pay is about £500 a year for the session : but about £3 per day is deducted for every day the member does not attend. I cannot find any record of payments to members of the Provincial Legislatures.

France.—The salary is £600 a year, with a free pass over the railways.

10 Similarly, the English Court of Appeal has recently granted an injunction against the use of the name in England. *Rey v. Lecouturier*, 124 L. T. 195. As the case is not reported in full, the grounds upon which the English court reached this result are not entirely clear, but the decision seems to be based on the third principle—deception of the public.

11 The Ann, 9 Cranch (U. S.) 289.

Germany.—Members of the Reichstag, or Legislative Assembly, receive for the session £150, with a deduction of £1 per day for each day's absence. Members also travel free over the railways. In the State Legislatures the allowances range from 6s. to 15s. per day while the Legislature is in session, with travelling fares.

Switzerland.—The pay is 16s. per day, and 2d. per kilometre for travelling expenses.

Australia.—The pay is £600 per annum for the Commonwealth, and £300 for the State Legislatures, with free railway passes and other privileges.

PERSONAL MONARCHY.

In an editorial on "Personal Monarchy" the *London Globe* compares the cost to the two nations of the President of the United States and the King of England. "The monarchy in this country," says the *Globe*, "costs us somewhere about half a million a year, and regarded from every standpoint that is not a large sum for the provision of a ruler who is charged with the supervision of nearly four hundred millions of human beings and a fifth of the habitable globe. Take the only repulic which in wealth and extent is comparable to our own empire—the United States of America. The nominal salary of the President is comparatively small, but republican simplicity does not enable our cousins to get him into the White House for less than four millions sterling. As a matter of fact, a presidential election in America costs anything from five to seven millions, and it takes place every four years. On the calculation the President costs on the average a million and a half a year. If we only reckon the sum at a million, it is still double what our monarchy with all its state and splendid associations cost ourselves."

CAN DEMOCRACY MANAGE ?

It is becoming a grave question, both in America and elsewhere, whether a democracy can really manage its own most improtant affairs, in finance, in defence, or in amelioration of the social order; whether in fact the distribution of political power throughout the whole community is not tending everywhere to political paralysis, and to the emergence of new tyrannies more potent and far-reaching than the old ones from which we flatter ourselves that we have been fortunately delivered.—*Times*. (*Indian Review*).

INDIAN CASES.

PRIVY COUNCIL DECISION.

Mortgage—Prior mortgage of whole property—Shares subsequently mortgaged to several persons—Rights of mortgagees, how to be adjusted—Right to redeem—Successive—redemption suits by different mortgagees—Res judicata—Civil Procedure Code (Act XIV of 1882), Section 13 Explanation II.

A property belonging to A and B was mortgaged to X in 1879. In 1888 A mortgaged his share only to Y and in 1897 B similarly mortgaged his share to Z. Y had redeemed X in 1891. Z first sought to redeem Y in respect of the share mortgaged to himself but on Y's objection that the whole property should be redeemed, Z's suit was dismissed and he subsequently instituted a suit to redeem the whole property and succeeded. In a suit by Y to redeem Z in respect of the share mortgaged to Y.—

Held, that as Z did not accept Y's offer to redeem the whole property, Y was entitled to redeem the share mortgaged to him — *Thakur Jowahir Singh v. Thakur Baldeo Baksh Singh*, XII *Calcutta Weekly Notes*, 515 (P. C.)

MISCELLANY.

We see that the papers have revived the "bon mot" attributed to the late Lord Russell when Sir Charles. A barrister, leaning across the benches during the hearing of a bigamy charge, whispered, "Russell, what's the extreme penalty for bigamy?" "Two mothers-in-law," instantly replied Russell.—*Law Notes*.

A layman is naturally horrified to find a case involving only 8s 8d. going to the House of Lords. This was the amount in the case of the *Great Western Rail Co. v. Philips & Co., Limited* (post, p. 70). The coal merchant entrusted an empty waggon to the railway company to be conveyed to a colliery to get loaded for a customer. The waggon took four days in transit, and the coal merchant, to complete his contract with his customer, had to hire an emergency waggon. For this he claimed 8s. 8d. as demurrage from the railway company. The latter admitted delay and proffered 2s. The case was brought before a County Court judge, who decided that he had no jurisdiction, and that the question had to be referred to an arbitrator appointed by the Board of Trade. The King's Bench and the Court of Appeal reversed the decision of the County Court judge. The railway company carried the case to the House of Lords, who has just decided that the County Court judge was right. We wonder how many thousands of pounds will be involved by the principle decided. This question has been a worry in the coal trade for years, and, so far as we understand it, the coal trade will not like the decision.—*Law Notes*.

The Preston Town Council is teaching schoolboys the evils of premature smoking. It is not generally known that in Cape Colony the Youths' Smoking Prevention Act makes it a penal offence to supply tobacco to any person under sixteen, while its use in any form by scholars under this age, except on production of a written order from the guardian or employer, is severely punishable. Juvenile smoking is prohibited, under the age of sixteen in Prince Edward Island, Nova Scotia, British Columbia, and other colonies; in Tasmania the age is as low as thirteen; while in Ontario and New Brunswick it is as high as eighteen. Even in the Channel Islands and the Isle of Man it is illegal for any youth under fourteen to smoke. Many of the countries of Europe and the United States have similar prohibitory laws. We propose this session to follow in their footsteps.—*Law Notes*.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 7TH & 14TH MAY, 1908. [Nos. 17 & 18.

THE UNITY OF ESTATES NECESSARY TO EXTINGUISH AN EASEMENT.

The notion, found in the civil law, that one piece of land could have rights as against another piece of land,¹ was easily assimilated by the medieval legal mind.² That conception, unreasoning as it seems, cannot be wholly ignored to-day. It is fundamental that easements are an incident of land, even to the extent that a disseisor is entitled to the enjoyment.³

Property may be said to give the entitled party the power of applying it to all purposes; an easement to give the entitled party the power of applying the subject—that is, the servient tenement—to exactly determined purposes.⁴ Two estates are thus presupposed, the dominant and the servient. Then, as an easement is a definite subtraction, accruing to the owner of the one, from the indefinite right of user or exclusion residing in the owner of the other, it follows that no one has an easement over his own land, for otherwise he would have a right in a thing against himself. Thus results the doctrine that if the two estates become united in ownership the easement is extinguished. The particular right is merged in the more extensive right, and the user becomes an act of property. The reason of the rule gains strength, in reality, from the so-called exception of the easement of watercourses, for there the user is not adverse.⁵ And so in the case of a warren.⁶ But the doctrine stands on a more technical ground than that of mere unity of ownership, as it is commonly stated. There must be unity of seisin.⁷ Even then, if the estates are of different duration, the easement is merely suspended.⁸ The user is then just as clearly an act of property, but the distinction is perhaps to be attributed to a medieval conception that in such cases the two pieces of land were not completely welded. In short, the principle

1 See D. 8, 4, 12, . . . "that land is bound to land."

2 See Bracton, fol. 220 b, § 1. "One estate is free, the other subjected to slavery."

3 See Holmes, Common Law, 381.

4 See Austin, Jurisp., 4 ed., 823.

5 *Sury v. Pigot*, Poph. 166. "The thing hath its being *ex jure naturae*."

6 Y.B., 35 Hen. VI, f. 55, 56, since, they say, "a man may have a warren in his own land."

7 *Thomas v. Thomas*, 2 C. M. & R. 34; *Dority v. Dunning*, 78 Me. 381 (unity of an estate in fee and an estate for years).

8 *Rex v. Inhabitants of Hermitage, Carth.*, 239 (unity of a fee simple indeterminable with a fee simple determinable); *James v. Plant*, 4 A. & E. 749 (unity as coparcener in fee simple and tenant in common in tail general).

seems to be that, in order to work extinction of the easement by merger, the owner of the two tenements must have an estate in fee simple in both of an equally durable, indeterminable nature.⁹

The further question arises, whether unity of possession or enjoyment must be added to the unity of seisin. A recent decision of the English Court of Appeal that, where the owner of the dominant tenement, who had a tenant, conveyed to the owner of the servient, an easement of light was not extinguished as against the tenant, appears, at first sight, an authority for such a broad doctrine. *Richardson v. Graham*, [1908] 1 K. B. 39. But this case stands on its own ground and is but a logical conclusion from a recent decision of the House of Lords,¹⁰ following two earlier cases,¹¹ to the effect that, in order to acquire an easement of light under the Prescription Act,¹² the user need not be of right, but need only be actual for the prescriptive period, and that hence one termor can prescribe for such an easement as against another under a common landlord. Then, if the common ownership does not prevent the acquisition of the easement of light, a merger of the two estates should not operate against the tenant to extinguish the easement already acquired, unless the conveyance gives also the right to possession. This brings out admirably the intrinsic nature of the general principle. If, in order to acquire the easement, the user must be adverse to the land, as in the ordinary easement, one termor cannot prescribe as against another under a common landlord,¹³ or as against his landlord.¹⁴ Therefore it results, conversely to the anomalous easement of light, that as unity of seisin will prevent the acquisition of the ordinary easement, so a merger of the two estates in fee simple, though without unity of possession, will work an extinction—a conclusion not without support.¹⁵—*Harvard Law Review*.

ENGLISH CASES.

[Taken from *Select English Cases*].

Master and servant—Purchase of motor car—Car being driven for delivery to purchaser—Negligence of driver—Liability.

The defendant purchased a motor-car in London, and the vendor supplied a driver to drive the car to a certain place outside London and deliver it there. While the car was being so driven, it collided with and damaged a motor-bicycle owing to the negligence of the driver. In an action by the owner of the bicycle against the defendant to recover for the damage to the bicycle—

Held, that the driver, though he was the general servant of the vendor, was at the time under the control of the defendant, who had the property in and possession of the car, and that therefore the defend-

⁹ See Gale, Easements, 7 ed., 486.

¹⁰ *Morgan v. Fear*, [1907] A. C. 425.

¹¹ *Frewen v. Phillips*, 11 O. B. (N.S.) 449; *Mitchell v. Cantrill*, 37 Ch. D. 56.

¹² 2 & 3 Wm. IV, c. 71, § 3.

¹³ *Kilgour v. Gaddes*, [1904] 1 K. B. 457.

¹⁴ *Gayford v. Moffatt*, L. R. 4 Ch. 133.

¹⁵ See *Buckby v. Coles*, 5 Taunt. 311, 315; *Clayton v. Corby* 2 Q. B. 813, 826.

ant was liable to the plaintiff for the negligence of the driver.—*Jones v. Scullard*, (1898) 2 Q. B., 565; 14 T. L. R., 580 followed; *Perkins v. Stead*, 23 T. L. R., 433.

INDIAN CASES.

PRIVY COUNCIL DECISIONS.

Arbitration—Award—Decree passed thereon—Appeal—Appeal from Governor-General's Agent in Bhopal to the Privy Council—Native State.

No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision.

Quære.—Whether an appeal lies to his Majesty in Council from a decision of the Governor-General's Agent at Sehore in Bhopal?—*Hansraj v. Sundar Lal* and *Hansraj v. Dwarka Das*, XII Calcutta Weekly Notes, 585 (P. C.)

Benami transfer—Fraudulent object defeated—Right of owner to recover from Benamidar—Limitation—Limitation Act (XV of 1877), Schedule II, Articles 91 and 144.

Where a *benami* deed of transfer of land was executed with the object of defrauding creditors but the object failed—

Held, that the owner was entitled to recover the land from the *benamidar*, and that without being required to set aside the deed as a preliminary.

Article 144 and not Article 91 of Schedule II of the Limitation Act therefore applied to the suit.—*T. P. Petherpermal Chetty v. R. Muniandy Servai*, XII Calcutta Weekly Notes, 562 (P. C.)

MISCELLANY.

HIGHLY SUSPICIOUS.—“It is a rule to which good lawyers usually adhere,” says a Philadelphia attorney, “never to tell more than one knows.” There was an instance in England, not many years ago, wherein a lawyer carried the rule to the extreme.

“One of the agents in a Midland Revision Court objected to a person whose name was on the register, on the ground that he was dead. The revision attorney declined to accept the assurance, however, and demanded conclusive testimony on the point.

“The agent on the other side arose and gave corroborative evidence as to the decease of the man in question.

“‘But, sir, how do you know the man's dead?’ demanded the barrister.

“‘Well,’ was the reply, ‘I don't know. It's very difficult to prove.’

“‘As I suspected,’ returned the barrister. ‘You don't know whether he's dead or not.’

"Whereupon the witness coolly continued: 'I was saying, sir, that I don't know whether he is dead or not; but I do know this: they buried him about a month ago on suspicion.'"—*Harper's Weekly*.—*The Green Bag*.

A LAWYER'S LUCK.—A North Carolina lawyer says that when Judge Buxton of that State, made his first appearance at the bar as a young lawyer, he was given charge by the State's solicitor, of the prosecution of a man charged with some misdemeanor.

It soon appeared that there was no evidence against the man, but Buxton did his best, and was astonished when the jury brought in a verdict of "guilty."

After the trial one of the jurors tapped the young attorney on the shoulder. "Buxton," said he, "we didn't think the feller was guilty, but at the same time didn't like to discourage a young lawyer by acquitting him."—*Lippincott's*.—*The Green Bag*.

NOT FOR THE COURT TO DECIDE.—The judge decided that certain evidence was inadmissible. The attorney took strong exception to the ruling and insisted that it was admissible.

"I know, your honor," said he, warmly, "that it is proper evidence. Here I have been practicing at the bar for 40 years, and now I want to know if I am a fool?"

"That," quietly replied the court, "is a question of fact, and not of law, so I won't pass any opinion upon it, but will let the jury decide."—*Stray Stories*.—*The Green Bag*.

LAWSUITS ABOUT TRIFLES.—Some years ago, when a Scottish farmer brought an action against the customs authorities for a wrongful levy of 1d he recovered his 1d, at a cost to himself and the defendants of £150 each.

An attempt to recover $\frac{1}{2}$ d from a Miss Annie Rayson cost a London tramways company £150 damages for malicious prosecution, in addition to heavy costs in all three sets of proceedings. But perhaps the most instructive case of all is one that was fought to the bitter end in the Italian courts.

A lawyer sued the octroi authorities for the recovery of a centime which he had been compelled to pay on a box of bonbons. This case was carried from court to court, with the ultimate result that the defendants had to refund the centime and to pay 3000 lire in addition for the expenses of the litigation.—*The Green Bag*.

A HIGHER COURT.—"Ever try an automobile, Judge?" said a friend.

"No," replied the Judge; "but I've tried a lot of people who have."—*Jewish Ledger*.—*The Green Bag*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

21ST MAY, 1908.

[No. 19.]

DEDICATION RESTRICTED BY THE DEDICATOR.

The doctrine of dedication is an anomaly in our law. Its existence is due to the public policy of giving effect to the intention of individuals to confer benefits upon the public¹ But when a dedicator seeks to place restrictions on the land he dedicates, a conflict of interests is presented. This conflict may exist in regard to reservations or limitations in favour of the dedicator, or to conditions imposed on the gift.

Certain reservations are consistent with the public user, and are therefore permitted.² But limitations which would be inconsistent with such user raise the issue, shall the grant fall or the limitation be disregarded? Unfortunately the courts have frequently avoided the question by going to great lengths to find that no inconsistency existed. Thus, for example, a road may be closed at all times to coal-wagons alone, or for seven months in the year to everybody.³ It is hardly necessary to comment upon the situation, if the user of many of our highways was thus limited. This attitude of the courts is comprehensible as a compromise between tenderness toward the dedicator and consideration for the public. Still it would seem preferable to be more ready to give effect to the public policy against such limitations and to face the issue frankly. If the owner had both the *animus dedicandi*⁴ and an intention to impose an inconsistent limitation, some cases say that no dedication results,⁵ thus making predominant consideration of fairness to the individual. The more modern tendency, however, seems to be to

1 See *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 434; *Jersey City v. Morris, etc.*, Co., 12 N. J. Eq. 545, 562; 16 HARV. L. REV. 329.

2 *Noblesville v. Lake Erie, etc., Ry.*, 130 Ind. 1; *Tallon v. Hoboken*, 60 N. J. L. 212, 217.

3 *Stafford v. Coyney*, 7 B. & C. 257; *Hughes v. Bingham*, 135 N. Y. 347. See also *Arnold v. Blaker*, L. R. 6 Q. B. 433. Further, these decisions seem inconsistent with the line of cases holding that the user must be for the whole public. *Poole v. Huskinson*, 11 M. & W. 827; *Trustees v. Hoboken*, 33 N. J. L. 13, 18.

4 If in view of the limitation it is found that the owner did not have the *animus dedicandi*, the public acquires no rights. *White v. Bradley*, 66 Me. 254.

5 *Poole v. Huskinson*, *supra*; see *Stafford v. Coyney*, *supra* 260; *Mercer v. Woodgate*, L. R., 5 Q. B. 26, 31. But see *Arnold v. Blaker*, *supra*, 437.

6 See *Richards v. Cincinnati*, 31 Oh. St. 506; *Haight v. Keokuk*, 4 Ia. 190, 210; *Noblesville v. Lake Erie, etc. Ry.*, *supra*, 4; *State v. Spokane, etc., Co.*, 99 Wash. 518, 532.

say that the grant is good and that the limitation falls.⁶ This result would appear to be more in keeping with the line of thought that found the claims of the public in these matters sufficiently strong to justify the creation of the doctrine of dedication. As an analogy pointing strongly this way, there is the holding that a wife loses her dower right in land dedicated by her husband without her consent, because "the public [right] shall be preferred before the private."⁷ The rule that a limitation repugnant to a grant is void furnishes another supporting analogy.⁸

The problem in regard to conditions raises very similar issues. If a condition precedent to user is imposed, there is no difficulty in requiring it to be fulfilled before the public acquires rights.⁹ But conditions subsequent stand on a different basis. It is more than inconvenient for the public to have to retire from land which it has been accustomed to use, and upon which it has expended money. The question arises more frequently thus: a man dedicates land for a certain purpose, and the public so uses it for a time; then an attempt is made to put it to another use, whereupon the dedicator brings ejectment on the theory of reverter for breach of condition. Because of a natural aversion to forfeitures, there has become well recognised a rule in regard to grants that courts will construe what is in form a condition subsequent as a covenant, in order to carry out what they consider the real intentions of the parties.¹⁰ Then further, in these cases of dedication, on the ground that public policy demands that the public should not incur a forfeiture, the courts disregard intention, treat all conditions as covenants, and deny a writ of ejectment.¹¹ Accordingly, an injunction to prevent the misuse will be granted.¹² An interesting variation is suggested by a recent case. A man dedicated land to a municipality upon condition that a street be constructed thereon, and that the abutting property-owners be free from assessment therefor and for other street improvements. The municipality accepted, built the street, and then sought to assess the abutting property-owners therefor, but without success. *Perth Amboy Trust Co. v. Perth Amboy*, 68 Atl. 84 (N. J., Sup. Ct.). If we regard the cost of the particular improvement in the parties' contemplation as the price paid for the land, the decision seems supportable, the second condition being construed as a covenant, which is specifically enforced. But exemption from all future assessments would seem to be beyond the

7 Co. Lit. 31 b. See 20 HARV. L. REV. 407.

8 1 Tiffany, Real Property, 171; *State v. Trask*, 6 Vt. 355, 364.

9 *People v. Williams*, 60 Cal., 498. A condition reserving the right to resume or change the use prevents dedication. *San Francisco v. Canavan*, 42 Cal. 547, 553. *Cf. Fitzpatrick v. Robinson*, 1 Hud. & B. 585.

10 *Avery v. New York, etc., R. R.*, 106 N. Y. 142.

11 *Cincinnati v. White's Lessee*, *supra*; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 507. But the dedicator can recover the land when the public abandons it, or the appointed use becomes impossible. *Halley v. Scott County*, 78 S. W. 149 (Ky.); *Campbell v. Kansas City*, 102 Mo. 326. See *Rowzee v. Pierce*, 78 Mis. 846.

12 *United States v. Ill. Cent. R. R.* 154 U. S. 225; *Church v. Portland*, 18 Ore. 73; *Warren v. Lyons City*, 22 Ia. 351.

municipality's authority.¹³ Illegal conditions subsequent are disregarded.¹⁴ Accordingly, it would seem that this much of the arrangement, construed as condition or covenant, should be given no effect¹⁵.—*Harvard Law Review*.

ENGLISH CASES.

[Taken from *Select English Cases*.]

Animal—Dog—Ferocious—Tendency to bite.

In order to make the owner of a dog liable for injuries caused to a person by its bite, it is not necessary to shew that the dog, to the owner's knowledge, has bitten or attempted to bite some one. It is sufficient to shew that, to the knowledge of the owner, the dog is a ferocious dog as regards human beings. The dog need not be ferocious at all times; it is sufficient if the dog is ferocious on certain occasions, as, for instance, when a bitch has pups.—*Itarners v. Lucile, Ltd.*, 23 T. L. R., 389.

Easement—Light—Enjoyment by lessees under common landlord.

The circumstance of two adjoining houses being held under the same landlord, does not prevent the one tenant from acquiring an indefeasible right to light as against the other; and this right enures in favour of that tenant and his successors not only as against the adjoining tenant, but as against the common landlord and all succeeding owners of the adjoining house. (1861) 11 C. B. (N. S.) 449 and (1887) 37 Ch. D. 56, *followed*.—*Morgan v. Fear*, (1907) A. C. 425; 76 L. J., Ch. 660.

Landlord and tenant—Lease—License to assign—Covenant to reside on premises.

The lease of a public house contained covenants on the part of the lessee to reside on the premises and personally conduct the business, and not to assign without the consent of the lessor unless such consent was unreasonably withheld. The lessee proposing to assign the lease to a limited company.

Held, that the lessor could reasonably withhold his consent, a limited company being unable to perform the covenant to reside on the premises and personally conduct the business.—*Jenkins v. Price*, (1908) 1 Ch. 10; 24 T. L. R. 70; 77 L. J. Ch. 41.

13 2 Dill., Mun. Corp., 4 ed., § 781 n.; Smith, Mun. Corp §§ 637, 1489. But see *Bartholomew v. Austin*, 85 Fed. 359.

14 *St. Louis, etc., R. R. v. Mathers*, 71 Ill. 592; *Scovill v. McMahon*, 62 Conn. 378.

15 *Armstrong v. St. Mary's*, 21 Oh. Circ. Ct. Rep. 16; *Richards v. Cincinnati*, *supra*; *S. Louis v. Meier*, 77 Mo. 13.

INDIAN CASES.

(PRIVY COUNCIL DECISIONS).

Benami, transaction whether—*Oral evidence unsatisfactory—Surrounding circumstances and considerations of probability to be looked into.*

Where the question was whether a document which on its face was a mortgage-bond was a genuine or a fictitious transaction, but at the trial persons who might have been expected to be prominent witnesses were not called, and the evidence that was called was open to much adverse criticism.

Held, that in the circumstances it was necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct.—*Dalip Singh v. Chaudhrein Nawal Kunesar*, *XII Calcutta Weekly Notes*, p. 609.

MISCELLANY.

WITHIN HIS RIGHTS.—The Judge—"Was your chauffeur guilty in this accident?"

The Prisoner—"No, your honor, the victim was run over in entire compliance with the ordinance."—*Meggendorfer Blatter—Green Bag*.

RELIGIOUS PERSECUTION.—A man addicted to walking in his sleep went to bed all right one night, but when he awoke he found himself on the street in the grasp of a policeman. "Hold on," he cried, "you mustn't arrest me. I'm a somnambulist." To which the policeman replied, "I don't care what your religion is—yer can't walk the streets in yer nightshirt."—*New England Craftsman—Green Bag*.

ADDRESS.—Joseph Chamberlain was the guest of honor at a dinner in an important city. The mayor presided, and, when coffee was being served, the mayor leaned over and touched Mr. Chamberlain, saying, "Shall we let the people enjoy themselves a little longer, or had we better have your speech now?"—*Christian Register—Green Bag*.

QUITE FEASIBLE.—A farmer, though severely cross-examined on the matter, remained very positive as to the identity of some ducks which he alleged had been stolen from him.

"How can you be so certain?" asked the counsel for the prisoner. "I have some ducks of the same kind."

"Very likely," was the cool answer of the farmer; "these are not the only ducks I've had stolen."—*Green Bag*.

IN A FRENCH COURT.—Counsel (addressing the judge after he had got his client, a thief, acquitted in the face of strong evidence): Your honor, I would be obliged if you would order that this man be not released from custody until to-morrow.

Judge: Certainly; but what is your reason?

"Well, you see, the road near my home is rather lonely, and as my client knows quite well that I shall have money on me he might possibly lie in wait for me."—*Bon Vivant—Green Bag*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

28TH MAY, 1908.

[No. 20.]

LIABILITY FOR NEGLIGENT MISREPRESENTATIONS.

Whether or not an action can ever be maintained for the negligent use of language is a question on which there seems to be no conclusive authority. It is, however, raised squarely by a recent Ohio decision. A demurrer was sustained to a petition alleging that the defendant company was engaged in making abstracts of title to realty; that it was customary for purchasers of realty, even though under no contract relation with the defendant, to rely on these abstracts; and that the plaintiff was damaged by acting on a negligently defective abstract made by the defendant. *Thomas v. Guarantee Title and Trust Co.*, Circ. Ct. Cuyahoga Co., Nov. 18, 1907. It seems clear that the mere existence of a custom to rely on such abstracts is not sufficient basis for a contract relation,¹ and that, in spite of some decisions which appear to leave the matter in doubt,² the plaintiff could not recover in an action for deceit.³ If the plaintiff is to recover, therefore, negligent use of language must be the basis of the action. It has been held that a lawyer is not liable for the results of a negligent mistake in a casual opinion given to one not a client.⁴ Although that case can be distinguished on the ground that the plaintiff was not reasonable in relying on the opinion, there are dicta to the effect that no such action will lie.⁵ Nevertheless, from principles laid down in analogous cases it would seem that the demurrer in the present case should have been overruled.

The problem depends on whether or not there is a duty to use care as to the accuracy of representations. Undoubtedly such a duty does not exist under all circumstances, but a review of the decisions makes it equally certain that at times such a duty does exist. There may be a duty imposed by statute, as in the case of recording clerks.

¹ *Savings Bank v. Ward*, 100 U. S. 195. *Of. Dickle v. Abstract Co.*, 89 Tenn. 431, allowing recovery where the defendant knew that the plaintiff would so rely.

² *Krause v. Busacker*, 105 Wis. 350.

³ *Peek v. Derry*, 14 App. Cas. 337. See 14 HARV. L. REV. 185.

⁴ *Fish v. Kelly*, 17 C. B. (N. S.) 194.

⁵ See *Angus v. Clifford*, [1891] 2 Ch. 449, 470; *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 501.

Then if the clerk negligently fails to record a mortgage, he is liable to a plaintiff who relied on the record to his damage.⁶ And, apart from statute, in this country telegraph companies are considered to owe such a duty to the public that the recipient of a telegram may recover for losses caused by negligent mistakes made in transmission.⁷ The courts also find there is a breach of duty where the misrepresentation imperils the lives of others.⁸ An attempt has been made to confine the duty to use care in making representations to cases where "the act is one imminently dangerous to the lives of others or is an act performed in pursuance of some legal duty."⁹ Other decisions, however, show that this limitation is not sound. Physicians have been held liable to persons with whom there was no privity of contract for the results of negligent opinions which were not imminently dangerous to life.¹⁰ It has even been held that a druggist is similarly liable for negligently and falsely representing a hair tonic as harmless.¹¹ The position of the abstract company can be distinguished only on the ground that the damage caused is pecuniary instead of physical, and such a distinction seems untenable. In both cases the plaintiffs were reasonable in relying on the statement; in both the defendants knew persons such as the plaintiffs would rely on the statements and would probably be damaged if the statements were false. It is submitted, therefore, that a similar duty to use care should be imposed on the defendants in both cases.¹²—*Harvard Law Review*.

ENGLISH CASES.

(Taken from Select English Cases).

Damages. Measure of—Risk of future subsidence.

A surface owner has no cause of action against the owner of a subjacent stratum who removes the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner may recover for that damage as and when it occurs. Depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. *West Leige Colliery Co., v. Tunncliffe and Hampson, Ltd.* (1908) A. C. 27: 77 L. J. Ch. 162: 24 T. L. R., 146: 12 C. W. N. 62n.

Ferry, Disturbance of—Bridge—Loss of Traffic—Damage.

The owner of a ferry cannot maintain an action for loss of traffic caused by the construction of a bridge; for the franchise of a ferry is

⁶ *Appleby v. State*, 45 N. J. L., 161.

⁷ *Western Union Tel. Co. v. Dubois*, 128 Ill. 248.

⁸ *Thomas v. Winchester*, 6 N. Y. 397. The defendant who negligently sold a dangerous drug as harmless was held liable to a third party with whom there was no privity of contract.

⁹ *Savings Bank v. Ward*, *supra*, 206. See 57 Am. Dec. 461, n.

¹⁰ *Edwards v. Lamb*, 69 N. H. 599; *Harriott v. Plimpton*, 166 Mass. 585.

¹¹ *George v. Skivington*, L. R. 5 Exch. 1.

¹² *Cf.* 14 HARV. L. REV. 184-99.

not a grant of an exclusive right to carry across a stream by any means of a ferry and the bridge is not a disturbance of the ferry. (1877) 2 Q.B.D. 224 followed. *Dibden v. Skirrow*, (1908) 1 Ch. 41 : 77 L. J. Ch : 107 : 24 T. L. R. 70.

Probate—Will—Separate sheets of paper attached together—Execution.

A testator wrote his Will on two separate sheets of paper, stating at the top of the first sheet and at the bottom of the second sheet that the writing was his Will. The testator held the two sheets together while he and the attesting witnesses signed their names.

Held, that the two sheets were attached at the time of execution by the testator holding them together, and that the Will must be admitted to probate *Lewis v. Lewis*, (1908) P. 1 : 77 L. J. P. D. & A. 7 : 21 T. L. R. 45.

Ship running at loss—Collision—Damage.

Shipowners who were running their ship at a profit, began to run her with other ships on a different trade route so as to secure a footing there in the hope of making a profit in the future. While on one of these voyages the ship was injured by collision with another ship owing to the fault of the latter. At the time of the collision she was running at a loss.

Held, that the owners were not entitled to recover, in addition to out of-pocket expenses, damages for the loss of the use of their ship during the time it was being repaired. *The Bodlewell*; (1907) P. 286 : 76 L. J. P. 61 : 23 T. L. R. 356.

Will—Construction—Child en ventre sa mere.

A child *en ventre sa mere* at a particular time, who is subsequently born alive, is to be considered as "born" at that time, where such construction of a Will is for the benefit of the child, and no contrary intention appears from the Will. 5 S. E. C. (N. S.) 100 : (1907) A. C. 139 : 76 L. J. Ch : 339 : 23 T. L. R., 392 followed. *In re Salamande Pass v. Sonnenthal*, (1908) 1 Ch : 4 : 77 L. J. Ch : 60.

Will—Gift during widowhood—Wife not legally married to testator.

A testator who had gone through the ceremony of marriage with a married woman, made his Will whereby he gave the income of his residuary estate to "my said wife during her life if she shall so long continue my widow for her own use and benefit, and upon or after her decease or second marriage" upon trust for the children of the testator. The testator was never married to any other person, and at the time when he went through the ceremony of marriage he knew that his alleged wife had then a husband living.

Held, that the woman was entitled to a life-interest in the residuary estate unless and until she contracted a marriage subsequent to the testator's death. *In re Wagstaff, Wagstaff v. Jalland*, (1908) 1 Ch : 162 : 24 T. L. R. 136 : 7 C. L. J. 6n.

MISCELLANY.

If an English company holds all the shares in a German company, is the English company liable to pay income tax on all the profits made by the German company? This question was argued in *Gramophone Typewriter, Limited v. Stanley*, *Weekly Notes* p. 88. And the Court of Appeal, affirming Walton, J., held that the English company is only liable to income tax on such portion of the German company's profits as are received in England.—*Law Students' Journal*.

If a man leaves his wife and children and provides them with no means, although he is earning good wages, he can be convicted of having wilfully neglected his children, under sixteen, in a manner likely to cause them unnecessary suffering and injury to health, under Section 1 of the Prevention of Cruelty to Children Act, 1904. So held the Court for Crown Cases Reserved in *Rex v. Connor* on the 28th March. The man was the legal guardian of his children, and as the only reason why he had not the actual custody of them was that he had chosen to abandon them, he still had the custody of them for the purposes of this Act. And if in fact the man's omission to send any part of his wages to his wife was likely to cause the children unnecessary suffering and injury to health, he could properly be convicted. The evidence showed that the children were ill-clad and ill-fed as the result of his neglect, and would have had to go to the workhouse but for some relations of the wife. The new point is that the father can be prosecuted although his children have not become chargeable to the parish.—*Law Students' Journal*.

We are pleased to read that the Bar Council has expressed the view that counsel are not entitled to refresher fees for days on which they are not present. Further, that a barrister cannot accept a brief from a town clerk who is not a solicitor in any case in which he could not accept one direct from a lay client; that a barrister who is in the service of a public body is not entitled to do any work for that body in his capacity as a member of the Bar; but that, on the other hand, a barrister may, upon the hearing of a criminal appeal, take instructions and a fee from the accused without the intervention of a solicitor in the same manner as he can accept a dock defence at the trial; that a member of the Bar who answers legal questions in newspapers for the ordinary literary remuneration is guilty of a breach of professional etiquette; but the Council have decided, by a majority of twenty-one votes against fifteen, that no offence against professional decorum is committed "provided the name of the barrister giving the answer is not disclosed to the public, nor directly nor indirectly brought to the knowledge of the person asking the question." The question has, in view of this divergence of opinion on the Council, been left for discussion at the annual meeting of the Bar.—*Law Notes*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

7TH JUNE, 1908.

[No. 21.]

LIABILITY FOR RECEIVERSHIP EXPENSES.

It is within the discretion of the court to appoint a receiver, to determine his compensation, and to fix the manner in which that compensation shall be paid. The court through its receiver administers the estate for the benefit of those ultimately adjudged entitled to it. Receivership expenses, however, differ from ordinary costs in that the administration is supposed to be worth its cost to the true owner¹, and accordingly the general rule is that the receivership expenses are to be taken from the fund administered². The difficult problem is to determine when the facts justify such a departure from the general rule as to relieve the owner of the expenses of an involuntary management and place the burden on the party who instituted the proceedings. It may, indeed, be impossible to charge the fund because the possession of the receiver was never legal, as when his appointment was absolutely void because of a statute³, or when the property in question belongs to one not a party to the action⁴. In such case it is clear that the true owner cannot be forced to submit to a reduction of the fund to pay the expenses of the illegal administration. As the receiver is equally innocent, it seems equitable to charge the expenses to the person who caused the appointment of the receiver⁵. If, on the other hand, the appointment of the receiver under the circumstances was legal and proper, or, if erroneous, was acquiesced in by the defendant, the mere fact that the plaintiff eventually failed in his suit will not be enough to throw the expense on him⁶. If, however, the plaintiff was fraudulent, there can be no objection to making him stand the cost⁷. A more difficult class of cases is where the appointment was not justified on the facts presented and was vacated on appeal. The courts have reached all possible results on the liability for the

1 See *Porter v. Sabin*, 149 U. S. 473, 479.

2 *Jaffray v. Raab*, 72 Ia. 335.

3 *Couper v. Shirley*, 75 Fed. 168.

4 *Howe v. Jones*, 66 Ia. 156.

5 *Ephraim v. Pacific Bank*, 129 Cal. 589.

6 *Ferguson v. Dent*, 46 Fed. 83. But see *City of St. Louis v. St. Louis Gas Light Co.*, 11 Mo. App. 287.

7 *Highley v. Deane*, 168 Ill. 266.

receivership expenses incurred in the interim ⁸. It is submitted that the proper rule is first to protect the receiver by giving him a lien on the fund and then to let the defendant recover from the plaintiff any actual loss he may have suffered as a result of the receivership ⁹.

A further question is presented when the funds prove insufficient to pay the receiver's expenses. Here, if the suit is not successful, as between the plaintiff and the receiver it seems equitable to make the plaintiff pay the expenses of the management of the property by the court. But if the plaintiff's claim is sustained, it takes extraordinary circumstances to justify charging him with the deficit. Thus, when by agreement certain money which would naturally have gone into the fund was paid directly to the plaintiff and the fund proved too small to cover the receivership expenses the plaintiff was rightly called on for the balance¹⁰. But in the ordinary case the plaintiff should not be held, since the receiver is not the agent of the plaintiff but of the court itself. Accordingly the Supreme Court of the United States recently held that a creditor who had a receiver appointed over a quasi-public corporation could not be charged with the expenses of managing the property. *Atlantic Trust Co. v. Chapman*, 208 U. S. 360¹¹. To justify holding the plaintiff there must be special circumstances which change the equities of the situation, or the plaintiff must have assumed liability either by an agreement between the parties¹² or under terms required by the court as a condition precedent to the appointment of the receiver.—*Harvard Law Review*.

ENGLISH CASES.

(Taken from *Select English Cases*).

Arbitration—Umpire—Appointment by lot—Solicitor's clerk, assent of, not binding upon client.

Where the appointment of an umpire was by lot consented to by the attorney's clerks but not by the attorneys themselves, or their clients, the appointment was held bad although the parties, in ignorance of the mode of appointment, had attended the arbitrator. *Hodson and Drewry In re*, 7 *Dowling, Pr. Cas.* 569; 1 *W. W. and H.* 540; 2 *Jur* 1088; 54 *R. R.* 862.

Damages, measure of—Working coal in adjoining mine—Costs of severance—Value of coals when mined.

Where the defendant, in working his coal mine, broke through the barrier, and worked the coal under the land adjoining belonging to the plaintiff, and raised it for purposes of sale—

⁸ Receiver has no hold on the fund, *Pittsfield Bank v. Bayne* 140 N. Y., 321; receiver has a lien on the fund, *Espuela etc., Co. v. Bindle*, 11 Tex. Civ. App. 262; all expenses should be taxed against the plaintiff, *Myres v. Frankenthal*, 55 Ill. App. 390; running expenses should be taxed on the fund, but the receiver's commission on the plaintiff, *French v. Gifford*, 31 Ia. 428.

⁹ *Cutter v. Pollock*, 7 N. Dak. 631; *Mitter v. Brown*, 58 W. Va. 237.

¹⁰ *Farmer's Nat'l Bank v. Backus*, 74 Minn. 264. *Cf. Welch v. Renahaw*, 14 Colo. App. 526.

¹¹ *Accord, Farmers', etc., Co. v. Oregon, etc., Co.*, 31 Ore. 237. *But cf. Tome v. King*, 64 Md. 166.

¹² *Kelsey v. Sargent*, 2 N. Y. St. Rep. 669.

Held, that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it. *Martin v. Porter*, 2 Meeson and Welsby 351; 2 H. and H. 70: 52 R. R. 745: 17 R. C. 841.

Document—Alteration after acceptance—Mistake—Addition of words in furtherance of original intention of parties.

Defendant gave plaintiff a promissory note, without the words "or order". Six months afterwards, plaintiff mentioned the omission to defendant, who answered that the omission was his, the defendant's, own, and consented that the words should be inserted, which was done accordingly. The note was not re-stamped.

The note having been declared on as altered and issue joined on a plea denying the making of the note *held* that on the above evidence, the jury were justified in finding for plaintiff as it appeared that the alteration was made only in furtherance of the original intention of the parties, and to correct a mistake, in which case no new stamp was requisite. *Byron v. Thompson*, 11 Adol and Ellis 31; 3 P. and p. 71, 9 L. J. (N. S.) Q. B. 26; 52 R. R. 269.

Infant—Contract—Necessaries, what are—Question for jury.

To a declaration for goods sold the defendant pleaded his infancy, to which the plaintiff replied that the goods were suitable to the degree, estate and condition of the defendant—

Held, that the term "necessaries" did not include articles as were purely ornamental, but included such things as were useful and suitable to the estate and condition in life of the party and not merely such as are requisite for bear subsistence.

It is the question for the jury whether the articles were bought for the necessary use of the party and suitable to his condition. *Peters v. Fleming*, 6 Meeson and Welsby 42; 9 L. J. (N. S.) Ex. 81: 55 R. R. 425.

Negligence—Master and servant—Hire of Horse and coachman from stable—Injury caused by coachman's negligence—who is answerable as master.

A man does not necessarily become the servant of a person for whose immediate benefit and under whose apparent authority he is doing his work. Where the owners of a carriage were in the habit of hiring horses from the same person, to draw it or a day or drive, and the owner of the horses provided a driver through whose negligence an injury was done to a third party, *held*, that the owners of the carriage were not liable to be sued for the injury and that it made no difference that the owners of the carriage had always been driven by the same driver he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house. *Quarman v. Burnett* 6 Meeson and Welsby 499; 9 L. J. (N. S.) Ex. 308; 4 Jur 969; 55 R. R. 517.

MISCELLANY.

A GRATEFUL CLIENT CONFIDING SECRETS.—O'Connell said he was once counsel for a cow-stealer, who was clearly convicted, the sentence being transportation for fourteen years. At the end of that time he returned, and, meeting O'Connell, began to talk of the trial. O'Connell asked him how he always contrived to steal the fat cows, to which he gravely replied: "Why, then, I'll tell your honour the whole secret of that, Sir. Whenever your honour goes to steal a cow, always go on the worst night you can, for if the weather is very bad, the chances are that nobody will be up to see your honour. The way you'll always know the fat cattle in the dark is by this token—that the fat cows always stand out in the more exposed places, but the lean ones always go into the ditch for shelter." "So," said O'Connell, "I got that lesson in cow-stealing *gratis* from my worthy client."—*Madras Law Journal*.

A JUDGE THREATENING TO COMMIT CURRAN.—Curran, the Irish Counsel, offended Justice Robinson. "Sir," exclaimed the judge, in a furious tone, "you are forgetting the respect that you owe to the dignity of the judicial character." "Dignity! my Lord" retorted Curran, "upon that point I shall cite you a case from a book of some authority with which you are perhaps not unacquainted. A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger and imagining that he was the stronger man, resolved to resent the affront, and taking off his coat, delivered it to a bystander to hold; but having lost the battle, he turned to resume his garment, when he discovered that he had unfortunately lost that also—that the trustee of his habiliments had decamped during the affray. So, my Lord, when the person who is invested with the dignity of the judgment-seat, lays it aside for a moment, to enter into a disgraceful personal contest, it is vain, when he has been worsted in the encounter, that he seeks to resume it—it is in vain that he endeavours to shelter himself behind an authority which he has abandoned." The Judge cried out: "If you say another word, Sir, I'll convict you." "Then, my Lord, it will be the best thing you'll have committed this year." The Judge did not keep his threat; he applied however, to his brethren to unfrock the daring Advocate, but they refused to interfere, and so the matter ended.—*Philip's Curran—Madras Law Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

14TH JUNE, 1908.

[No. 22.]

THE EFFECT ON AN INSURANCE POLICY OF THE EXECUTION OF THE INSURED FOR A CRIME.

Nearly eighty years ago it was decided in England that, even though a policy of life insurance contains no provision avoiding it for death at the hands of justice, it is against public policy to allow recovery when the insured has been executed for a crime ¹. This doctrine has been approved by text-writers ², and has been followed in recent years by the Supreme Court of the United States ³. In fact it is first questioned in a recent Illinois decision which reaches the opposite conclusion ⁴. *Collins v. Metropolitan Life Ins. Co.*, 83 N. E. 542. This decision rests solely on the ground that, since execution for felony no longer works corruption of the blood, there is no public policy against the descent of the felon's property. In allowing recovery the court assumes that even after the execution of the insured the policy is a valid chose in action, which is the very point in issue. It leaves unanswered the argument of all prior decisions that the provision for insurance against death at the hands of justice, included in the broad terms of the contract, is void as against public policy.

Where the insured commits suicide and the policy contains no suicide clause, the courts are almost unanimous in allowing beneficiaries to recover ⁵. But it has been held that the personal representatives of the insured cannot recover under such circumstances, partly on the ground that suicide is not a risk assumed by the insurer, but principally on the ground that the assumption of such a risk is against public policy. ⁶ There seems to be no sound reason for the distinction. ⁷ If it is against public policy for personal representatives to recover on a provision insuring against suicide, which is included in the broad language of the contract, it is against public policy for such a provision to be included

¹ *Amicable Ins. Co. v. Bolland*, 4 Bligh (N. s.) 194.

² 1 May, Ins., 4 ed., § 326; Blis, *Life Ins.*, 2 ed., § 223.

³ *Burt v. Ins. Co.*, 187 U. S. 362 (denying recovery even though the insured was innocent of the crime for which he was executed). See 14 HARV. L. REV. 624; 16 *ibid.* 453.

⁴ *Contra*, *Collins v. Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. 353.

⁵ *Fitch v. Life Ins. Co.*, 59 N. Y. 557; *Mills v. Rebstock*, 29 Minn. 380; *Morris v. Life Ins. Co.*, 183 Pa. St. 563; *Patterson v. Mutual Life Ins. Co.*, 100 Wis. 118; *Campbell v. Supreme Conclave*, 66 N. J. L. 274; *Seller v. Life Ass'n*, 105 Ia. 87; *Lange v. Royal Highlanders*, 100 N. W. 1110 (Neb.)

⁶ *Ritter v. Mutual Life Ins. Co.*, 169, U. S. 139. See *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 446.

⁷ *Campbell v. Supreme Conclave*, *supra*. See 11 HARV. L. REV. 547.

in any insurance contract, and the contract must be void to that extent. At least one case has taken this view and has denied recovery to a beneficiary⁸. But as the great weight of authority is opposed to this case and to the reasoning in the cases denying recovery to the representatives of the insured, it must be taken as settled that where the insured has committed suicide there is no public policy against recovery on a silent policy.

The two lines of cases seem irreconcilable in principle. For, whereas in the former it is said to be against public policy to insure against death as the result of a crime, in the latter it is considered not against public policy to insure against suicide which, if not a crime, is clearly an act against the policy of the law. On principle the former view seems the sounder. The argument that an express stipulation to insure against death at the hands of justice is against public policy as tending to encourage crime is unanswerable. Nor should it make a difference that the stipulation is embodied in a wider contract of indemnity⁹. Probably no court would hold valid an accident policy insuring a robber against injury while plying his trade. And certainly an insured cannot recover on a fire insurance policy where he intentionally burns the property insured, even though the policy is broad enough in its terms to cover all risks⁹. These analogies, however, have been disregarded in the suicide cases, and the modern tendency of the law, as there evidenced, is not to limit recovery on silent policies, even though considerations of public policy in some cases would seem to forbid it.¹⁰ The case under discussion, however, seems to accord with that tendency, and it is not improbable that, on the analogy of the suicide cases, it may be followed in spite of prior contrary decisions.—*Harvard Law Review*.

ENGLISH CASES.

Arbitration—Reference to three arbitrators or any two of them—Delegation of authority by two to third arbitrator—Award bad.

Where matters in difference are referred to the award of three arbitrators or any two of them, two of the arbitrators cannot delegate their authority to the third, the parties to the submission having a right to the joint judgment of at least two of the arbitrators upon the points submitted to their decision.

Where therefore a submission had been made to A, a barrister, and B and C, two merchants, or any two of them, and after evidence had been given on each side, A and B agreed to make their award in favour of the plaintiffs for a certain sum subject to the decision of A upon a point of law, to which award C did not altogether agree, but he agreed to the point of law being left to A; and the latter, without any other communication with either B or C, decided the point of law for the plaintiffs and

⁸ Hopkins v. Life Assur. Co., 94 Fed. 729.

⁹ Washington Union Ins. Co. v. Wilson, 7 Wis. 169.

¹⁰ McDonald v. Order of Triple Alliance, 57 Mo. App. 87. But see Hatch v. Ins. Co., 120 Mass 550.

drew up the award in their favour for the sum which had been mentioned, and after signing it at Birmingham sent it to London to be executed by whichever of the other arbitrators agreed with him where it was executed on the following day by *B*, the Court set the award aside. If *A* and *B* having finally agreed on the terms of the award when they last met had affixed their signatures thereto at different places and times. *Quære* whether the award could have been objected to on that ground? *Little, Roberts and Michhell v. Newton*, 2 *Man*, and *G.* 351 ; 2 *Scott N.R.* 509 ; 10 *L. J. C. P.* 88 ; 9 *Dowl P. C.* 437 ; 5 *Jur* 246 ; 58 *R. R.* 436.

Contribution—Principal—Surety—Limitation—Cause of action when accrues.

When one surety has paid more than his share of the debt he shall have a right to be re-imbursed whatever he has paid beyond it ; and there is no rule of law which requires him to pay the whole debt before he can call for re-imburement.

By a promissory note *E. H. W. D.* and *J. H.* jointly and severally promised to pay to *J. E.* 300£ with interest for the amount advanced to *E. H. W. D.*, one of the sureties paid the whole amount more than six years before the suit with the exception of 30£, which was paid by him within that period. In an action brought by *W. D.* against *J. H.* to recover contribution from him "as a co-surety," held that the plaintiff was entitled to recover only to the extent of 30£ which had been paid within the six years and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion.

Held, also, in an action on the same note against *E. H.*, the principal, that the Statute of Limitations was a bar to all except 30£ as the plaintiff had a right of action against the principal the amount he paid anything for so much money paid to his use. *Davies v. Evan Humphreys*, 6 *Meeson and Welsby* 153 : 9 *L. J. (N. S.) Ex.* 263 : 4 *Jury* 250, 55 *R. R.* 547.

MISCELLANY.

A SERGEANT INCAPABLE OF PUTTING A WRONG QUESTION TO WITNESS.—In the Court of Common Pleas, on the trial of *Thirtell v. Beams* Mr. Sergeant Taddy was examining a witness and asked him a question respecting some event "that had happened since the plaintiff had disappeared from that neighbourhood." Mr. Justice Parke immediately observed : "That is a very improper question and ought not to have been asked." "That is an imputation" replied the Sergeant "to which I will not submit. I am incapable of putting an improper question to a witness." "What imputation, Sir?" enquired the Judge angrily? "I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the

expression 'disappear' means 'to leave clandestinely.' " "I say," retorted Sergeant Taddy, "that it means no such thing." "I hope," rejoined the Judge, "that I have some understanding left and, as far as that goes, the word certainly bore that interpretation, and therefore was improper." "I never will submit to a rebuke of this kind." "That is a very improper manner, Sir, for a counsel to address the Court in." "And that is a very improper manner for a judge to address a Counsel in." The judge rose and said with great warmth. "I protest, Sir; you will compel me to do what is disagreeable to me." "Do what you like, my Lord." "Well," said Mr. Justice Parke, resuming his seat, "I hope I shall manifest the indulgence of a Christian Judge." "You may exercise your indulgence or your power in any way your Lordship's discretion may suggest; it is a matter of perfect indifference to me." "I have the functions of a Judge to discharge, and in doing so I must not be reprov'd in this sort of way." "And I", replied the undaunted Sergeant, "have a duty to discharge as Counsel, which I shall discharge as I think proper, without submitting to a rebuke from any quarter." Anxious to terminate this dispute, in which the dignity of the Court was compromised, Mr. Sergeant Lens rose to interfere. "No Brother! Brother Lens," exclaimed Mr. Sergeant Taddy, "I must protest against any interference." Sergeant Lens, however, was not to be deterred from effecting his intention, and, addressing the Bench, said: "My brother Taddy, my Lord, has been betrayed into some warmth." Here he was stopped by Sergeant Taddy seizing him and pulling him back into his place "I again," he exclaimed, "protest against any interference on my account—I am quite prepared to answer for my own conduct." "My brother Lens, Sir", said Judge Parke, "has a right to be heard." "Not on my account; I am fully capable of answering for myself." "Has he not a right to possess the Court on any subject he pleases?" "Not while I am in possession of it," retorted the undaunted Advocate, "and am examining a witness." Mr Justice Parke, then, seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair and was silent.—2 *Law and Lawyers*, 357.—*Madras Law Journal*.

MR. COUNSELLOR "THEREFORE."—Sergeant Kelly, of the Irish bar, had an inveterate habit of drawing conclusions directly at variance with his premises. In consequence of this peculiarity he was called "Counsellor Therefore." Curran said he was a perfect human personification of a *non sequitur*. One day, meeting Curran near St. Patrick's, he said: "The Archbishop gave us an excellent discourse this morning. It was well written and well delivered. Therefore I shall make a point of being at the Four Courts tomorrow at ten." His speeches to the jury were interminable. He would say: "This is so clear a point, gentlemen, that it is paying your understandings, but a poor compliment to dwell on it even for a moment. Therefore I shall now proceed to explain it to you at greater length." While the Court tittered, the Sergeant was wholly unconscious of these feats of his own genius for inconsecutiveness.—*Madras Law Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 21ST & 28TH JUNE, 1908. [Nos. 23 & 24.

STATE TAXATION OF THE PROCEEDS OF THE SALE OF IMPORTS.

The federal government has exclusive jurisdiction over interstate and foreign commerce whenever the national welfare requires uniformity of regulation¹. And it is clear that the importation of goods from foreign countries and from one state to another is a subject of national importance. While a state may indirectly affect such importation in the exercise of its police power, as in the enacting of reasonable regulations for inspection and quarantine,² any direct restriction is invalid. The mere form of the regulation is immaterial—whether a direct tax upon the goods or a privilege tax.³ It is the substance and not the form which constitutes the test.⁴ The right of importation would, however, be valueless if as soon as the goods were within the state's jurisdiction they or the proceeds of their sale could be made subject to a discriminating tax in favor of domestic products.⁵ The case which established this principle declared unconstitutional a statute which discriminated against importers of foreign goods by requiring them to take out a license for the privilege of sale. Curiously enough, this case, which merely denied the right of a state to tax imports as imports, was later relied on to establish the principle that foreign goods were entirely exempt from taxation until sold or used by the importer, or until taken from the original package and thus incorporated with the general mass of property in the state. This doctrine of the original package does more than protect foreign goods from discrimination. It denies to the state the right to tax these goods in common with domestic goods, and in fact results in discrimination in favor of foreign and against domestic products.

The unfortunate consequences of this mistaken theory have caused it to be limited. The meaning of the term "original package" has been restricted to the narrowest possible construction,⁶ and the extension of the principle to goods brought from one state into another has been

1 *Cooley v. Board of Wardens*, 12 How. (U. S.) 299.

2 *Morgan's S. S. Co. v. La. Board of Health*, 118 U. S. 455.

3 *Welton v. Missouri*, 91 U. S. 275.

4 *Postal Tel. & Cable Co. v. Adams*, 155 U. S. 688, 698.

5 *Brown v. Maryland*, 12 Wheat. (U. S.) 419. Nor can a state discriminate against products of another state by exempting domestic products from taxation. *Darnell v. Memphis*, U. S. Sup. Ct., Jan. 20, 1908.

6 See 18 HARV. L. REV. 580.

refused.⁷ Moreover, the Supreme Court has recently upheld the constitutionality of a state tax upon the proceeds of the sale of goods imported in the original package, when those proceeds were retained in the state in the form of bank deposits and bills for collection and remitted to the foreign principal only after the import duties and the expenses of importation and sale had been paid therefrom. *People v. Wells*, Jan. 6, 1908. Apart from the nature of the goods, such a tax upon cash and notes as capital employed in a business within the state is undoubtedly valid.⁸ And in this case, while the court admitted that the proceeds are not directly taxable,⁹ it held that they obtained a situs in the state, since they were retained for purposes of the business, and were thereby mingled with other goods in the state, and that they accordingly became subject to taxation. Unless, therefore, such proceeds are in transit, their immunity from taxation ceases. It is interesting to note that a similar tax upon amounts receivable on bills given for sales of goods in the original package was held unconstitutional by a state court on the ground that it was a tax upon the proceeds of the sale, before the proceeds themselves had been realized.¹⁰ The result of the present case, however, seems eminently sound. It is virtually a tax upon the business of importation. But there is no reason why such a business should not bear its proportionate share of the burden of taxation. Moreover the tax is in no way discriminatory against foreign commerce, and consequently is not a regulation of it.—*The Harvard Law Review*.

ENGLISH CASES.

(Taken from Select English Cases.

Carrier—Railway Company—Carriage of parcel to be paid on delivery—Probable loss on another Company's line.

A parcel was delivered at Lancaster to the Lancaster and Preston Junction Railway Company directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed on delivery. The aforesaid Railway Company were known to be proprietors of the line as far as Preston, where the Railway unites with the North Union Line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston.

Held, that the Lancaster and Preston Railway Company were liable for its loss.—*Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 Meeson and Welby 421: 10 L. J. Ex. 460; 2 Ry. Cas., 607; 5 Jur., 656, 58 R. R., 758.

Contract—Illegal consideration—Gaining money won at play—Loan for purpose of gambling—Transaction taking place in country where gambling not illegal—Recovery in English Court.

Money won at play or lent for the purpose of gambling in a country

7 Woodruff v. Parham, 8 Wall. (U. S.) 123.

8 New Orleans v. Stempel, 175 U. S. 309.

9 Cook v. Pennsylvania, 97 U. S. 566.

10 Paul Gelpi & Bro. v. Treasurer, 48 La. Ann. 1535.

where the games in question are not illegal may be recovered in the Courts of this country.—*Quarrier v. Colston*, 1 *Phillips*, 447; 12 *L. J. Ch.*, 57; 6 *Jur.* 959; 65 *R. R.*, 351; 41 *Eng. Rep.*, 587.

Contract—Sale of goods—Property in goods sold—Delivery of key—Retaining key of external enclosure—Possession of buyer.

Delivery of a key does not operate as delivery of the goods under the lock if it does not in fact give complete access to them. Therefore where goods are sold, to be paid for by instalments, the balance to be paid before removal, and the seller allows the buyer to place the goods under lock and key upon the seller's premises, and delivers the key to the buyer, but retains the key of the external enclosure, the balance being unpaid, the buyer has not such a possession as will entitle him to maintain trover against the seller upon a wrongful removal and sale of the goods.—*Milgate v. Kebble*, 3 *Man and G.* 100; 3 *Scott. N. R.* 358, 10 *L. J. C. P.* 277, 60 *R. R.* 475.

Copyright—Infringement—Selections to illustrate work.

The defendants published a work containing an original essay on modern English poetry biographical sketches of forty-three modern poets and selections from their poems amongst which were six short poems and parts of longer poems the copyright whereof belonged to the plaintiff. The selections constituted altogether the bulk of the defendants' work, but were alleged to have been introduced into it for the purpose of illustrating the essay. The Court restrained the publication of the defendants' work as being an infringement of the plaintiff's copyright.—*Campbell v. Scott*, 11 *Simons* 31; 11 *L. J. Ch.*, 166; 6 *Jur.*, 186; 54 *R. R.*, 321; 59 *Eng. Rep.*, 784.

Evidence—Legitimacy—Non-access—Presumption.

On a trial as to the legitimacy of children begotten when the husband and wife were living separately, the fact that they had opportunities of access is not conclusive of the legitimacy, but the presumption of intercourse may be rebutted by circumstances.

If there was an opportunity of access, but the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity existed was not the husband's.

Where it appeared that a wife was deserted by her husband who went to live with another woman that the wife at the end of three or four years married another man and that she had two children after that marriage and that eleven years after the second marriage she again co-habited with her husband and where it did not appear where the husband was between the times of his deserting and again co-habiting with his wife—

Held, that on this evidence non-access of the husband at the times when the children were begotten could not be found and that the wife's

living in adultery was not sufficient to show that the husband is not the father of the child. *Reg. v. The Inhabitants of Mansfield*, 1 Q. B. 444 10 L. J. M. C. 97 : 1 G. and D. 7 : 5 Jur. 505; 55 R. R. 307.

MISCELLANY.

COUNSEL AND JUDGES REMEMBERING THEIR CLIENTS' CASES.—A Counsel's head is very much like a caravanserai. It is full for a day or two of the minute details of the cases in which he is concerned on the one side or the other, so that during an argument all these particulars are in full view, and at the fingers' end, whenever the turns of the case require them to be made available. But after the case is decided a clean sweep is made, and both Counsel and Judge utterly forget in a few days the whole budget of facts they were so familiar with for the while, and fresh cases and particulars displace the preceding ones. One day, in arguing a case in the House of Lords before the Lord Chancellor Cranworth, Lord Brougham and Lord St. Leonards, a Counsel in answering a difficulty put by the Court, exclaimed: "That point was settled in the case of *Jones v. Smith*. One of your Lordships (Lord Brougham) who decided it will, no doubt, very well recollect how that very point was raised and decided two years ago." Lord Brougham at once retorted: "God forbid that my head should be filled with such rubbish! I remember nothing at all about it. Let us hear what it was!"

Mr. Bethell and Sir F. Kelly were fighting a case before a Vice-Chancellor, and discussing what was thought at the moment to be quite a new point, but which had, in fact, been settled by the House of Lords only the previous year, and in which also both of those Counsel had been engaged, and which was so remarkable that both might be expected to have recollected it. But neither Counsel referred to the prior case. After the argument was over, Mr. Bethell being reminded of the former case, and how thoroughly it would have borne out his argument if he had remembered it, exclaimed: "Well, no doubt that case was just in point! It only shows what a rogue that Kelly was not to allude to it, and what a fool I was not to think of it."—*Madras Law Journal*.

A GRATUITOUS OPINION BY COUNSEL.—Mr. Fazakerly, an eminent Counsel, was once stopped by a country gentleman, a neighbour, who asked him about some point then very important to him, and got the opinion verbally. Some time after, the gentleman called on the Counsel and said he had lost £500 by his advice, as it was a wrong opinion. The Counsel said he had never given an opinion, and, turning up his books, said he was confident of that. Being reminded that it was given during a drive the neighbours had some Summer's day near Preston, the lawyer replied: "Oh I remember now, but that was only my travelling opinion: and to tell the truth, neighbour, my opinion is never to be relied upon unless the case appears in my fee book."—*Madras Law Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.]

7TH JULY, 1908.

[No. 25.]

RECOVERY FOR DAMAGES FOR MENTAL SUFFERING IN TORT AND IN CONTRACT.

The right to recover for damages for mental suffering, in actions arising *ex delicto* and *ex contractu*, is a question in the law concerning which there is a diversity of judicial opinion. There is an apparent reluctance to grant recovery in such cases, due chiefly, perhaps, to the difficulty of definitely ascertaining the true measure of damage from a pecuniary point of view.

In actions arising *ex delicto* the weight of authority is in favour of a recovery for anguish of mind, but the right is limited to three well-defined classes of cases, *viz.*, first, where some physical injury has been inflicted; second, where the plaintiff has been subjected to personal indignity, as in defamation, malicious prosecution, or seduction; and third, where a clear legal right of the plaintiff has been invaded in such a wilful or malicious manner as would naturally cause mental distress, regardless of the preceding elements physical injury or personal indignity. It does not follow, however, that this is a proper element of damage in all tort actions, and it has been held that there could be no recovery for mental suffering which resulted to a mother from the death of a child by a wrongful act; nor for libeling the dead; nor for mere fright resulting in a nervous disorder; nor for anxiety for safety of one's self or family during a blasting operation; nor from threats or duress by means of which property was unlawfully procured. The better rule would seem to be that recovery for mental pain in this class of cases is restricted to those in which there is an accompanying invasion of a legal right, physical bodily injury, malice, insult or inhumanity.

As a general rule, pain of mind is not a subject of damages in actions arising *ex contractu*, except where the breach of a contract amounts in substance to an independent, wilful tort. Exceptions to the general rule are actions for breach of promise to marry, and actions against carriers for wilful or malicious injuries to passengers, in violation of their contract to carry safely. The great weight of authority is against a recovery for mental suffering through failure to deliver telegrams. Some Courts, however, hold *contra*, in accordance with the so-called "Texas doctrine." Where this doctrine has been followed it has been adhered to consistently,

and an extreme case is found in North Carolina, where recovery was allowed for fright and worry incident to a father's failure to meet his young daughter at a railroad station, because of the non-delivery of a telegram advising him of her arrival there at a scheduled hour, and the terror which ensued during a lonely ride at midnight to her home.

Recovery has also been allowed for mental pain resulting from the mutilation of a dead body; from the breach of contract to carry a dead body safely, where such breach constituted a wilful tort; and from the breach of contract of an undertaker to keep safely the body of a dead child. The Supreme Court of Minnesota, however, has recently refused a recovery for mental distress where a railroad company negligently failed to carry a dead body to its destination according to the usual train schedule, the delay interfering with the funeral plans and causing anxiety, humiliation and other anguish of mind. The case holds that the facts establish a breach of contract only, and in the absence of a wilful tort incident to such breach, mental suffering is not an element of damage. It would seem to be in exact accord with the general rule, and commends itself to the legal mind as a sound view of the question involved. The subject is thoroughly reviewed, and the authorities fully stated, in the opinion of the court.—*University of Philadelphia Law Review*.—*Canada Law Journal*

ENGLISH CASES.

(Taken from Select English Cases.)

Evidence—Secondary evidence—Lost document—Proof of reasonable search—Presumption that document was duly stamped.

Where secondary evidence is admitted to prove the contents of a lost instrument, the Court will presume that the instrument was stamped unless there be evidence showing that it was not stamped. To render secondary evidence admissible in proof of the contents of a lost document it is sufficient to prove that every reasonable search for the document has been made although every possible search may not appear to have been made.—*Hart v. Hart*, 1 *Howe* 1: 11 *L. J. Ch.*, 9: 5 *Jur.* 1007: 58 *R. R.* 1: 66 *Eng. Rep.*, 927.

Infant—Illegitimate child—Custody—Habeas corpus.

The mother of an illegitimate child of between eleven and twelve years of age obtained an *habeas corpus* directed to the putative father to bring her up before the Court. On the child being produced the Court declared that she might use her own discretion as to where she would go and the child being unwilling to go with her mother the Court would not permit the mother to take her by force.—*In re Ann Lloyd*, 3 *Man. and G.* 547: 4 *Scott N. R.*, 200: 5 *Jur.* 1198: 60 *R. R.*, 580.

License—Revocation—Sale of goods—Condition that buyer might enter to remove goods—Notice of revocation of license—Forcible entry.

Goods which were upon plaintiff's land were sold to defendant by the conditions of sale to which plaintiff was a party the buyer was to be allowed to enter and take the goods.

Held, that after the sale the plaintiff could not countermand the license. And defendant having entered to take and plaintiff having brought trespass--

Held, that defendant was entitled to the verdict though it appeared that plaintiff had between the sale and the entry locked the gates and forbidden defendant to enter and defendant had broken down the gates and entered to take the goods. *Wood v. Manley*, 11 *Adol and Ellis* 34; 3 *P. and D.* 5; 9 *L. J. (N. S.) Q. B.* 27; 3 *Jur.* 1028; 52 *R. R.* 271.

Mistake—Money paid under mistake—Bona fide forgetfulness of facts—Recovery back.

Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness of facts which disentitled the defendant to receive it, may be recovered back in an action for money had and received. It is not sufficient to preclude a party from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact unless he paid intentionally, not choosing to investigate the fact. *Kelly v. Solari*, 9 *Meeson and Welsby*, 54: 11 *L. J. Ex.*, 10; 6 *Jur.*, 107; 60 *R. R.*, 666.

Negligence—Omission to take precaution—Injury to trespasser—Directly due to act of third party.

Defendant negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old got upon the cart in play; another child incautiously led the horse on and the plaintiff was thereby thrown down and hurt

Held, that the defendant was liable though plaintiff was a trespasser and contributed to the mischief by his own act. And that it was properly left to the Jury, whether defendant's conduct was negligent and whether the negligence caused the injury.—*Lynch v. Nurdin*, 1 *Q. B.* 29; 10 *L. J. Q. B.*, 73; 4 *P. and D.*, 672; 5 *Jur.*, 797; 55 *R. R.*, 191.

MISCELLANY.

A COUNSEL WHO COULD NEITHER WRITE NOR SPEAK.—The King was reported to have enquired as to the fittest person for Judge in a certain vacancy caused by the Vice-Chancellor Hart being made Lord

Chancellor of Ireland, and His Majesty was told that the soundest lawyer practising in any of the Courts was a gentleman who unfortunately could neither write, nor walk, nor speak. This was said in allusion to Mr. John Bell's peculiar handwriting, his lameness, and his northern accent. Sir L. Shadwell was appointed on that occasion, on account of his politics being suitable.—*Madras Law Journal*.

COUNSEL'S SPECIAL RETAINERS.—According to the etiquette of the profession, no barrister may go to plead a cause on a different circuit from that which he usually attends, except on a special retainer; and if he wears a silk gown he cannot take a fee less than 300 guineas. This is to (prevent) the unseemly scramble for business which might otherwise take place. Some say that special retainers began with Erskine; but this is doubted. From 1783, till he left the bar Erskine had, upon an average, twelve special retainers a year.

Sergeant Davy once had a very large brief delivered to him with a fee of two guineas only marked on the back of it. His client asked him if he had read the brief. "Yes?" said Sergeant Davy, pointing to the words on the back, 'Mr. Sejeant Davy, two guineas.' "As far as that I have read, and for the life of me I can read no further!"

Mr. Sergeant Hill once had a case for his opinion delivered, upon which a fee of one guinea was paid to his clerk in his absence. The Sergeant kept the fee and wrote the following opinion: "I do not answer cases for a fee of one guinea." (Signed and dated in the ordinary way.)—*Madras Law Journal*.

A CASE FOR OPINION STICKING IN THE THROAT.—A client wrote a letter to Parsons, the American Advocate, stating a case, requesting his opinion upon it, and enclosing twenty dollars. After the lapse of some time, receiving no answer, he wrote a second letter, informing him of his first communication. Parsons replied that he had received both letters, had examined the case, and formed his opinion, but somehow or other "it stuck in his throat." The client understood this hint, sent him 100 dollars, and received the opinion. Twenty dollars for the legal opinion of Parsons, the greatest lawyer of his time!—*Judge Story's Life*.—*Madras Law Journal*.

COUNSEL EXCHANGING HATS.—When Chief Justice Parsons, the American Judge, was a leading advocate, he was engaged in a heavy case which gave rise to many encounters between himself and the opposing leader, Mr. Sullivan. During Parson's harangue, Sullivan picked up Parson's large black hat, and wrote with a piece of chalk upon it: "This is the hat of a d—d rascal." The lawyers sitting round began to titter, which called attention to the hat, and the inscription soon caught the eye of Parsons, who at once said: "May it please Your Honour, I crave the protection of the Court. Brother Sullivan has been stealing my hat and writing his own name upon it." This ready wit squared accounts for the time.—*Madras Law Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX]

14TH JULY, 1908.

[No. 26.]

APPLICATION OF PAYMENTS.

An inferior Canadian court has recently held that a payment the application of which was not directed by the debtor cannot be applied by the creditor to an outlawed debt in preference to an enforceable one. *Charles v. Stewart*, 11 Ont. Wkly. Rep. 421 (Ont., Fifth Div. Ct., Jan 2, 1908). There is no reason to suppose that this is the law of the particular jurisdiction ¹, or of any common law tribunal ². According to the usual statement of the common law on this subject, the payment may be applied by the debtor, by the creditor, or by the court, in the order named ³. It is believed that the apparent confusion in the cases has arisen from the fact that the rule is thus briefly stated in terms of the legal result, with no indication of the course of reasoning by which such a result may be reached.

Payment comprises both the act of handing over money with the intent to pay and the act of receiving it with the intent to be paid. Where there is only one debt, the creditor's intention is as essential as the debtor's; hence, when there are several debts, the intention of neither party, if uncommunicated, should determine which debt is discharged ⁴. If, however, at the time of payment the debtor expressly or impliedly communicates his intention, the creditor, though actually dissenting, is nevertheless bound, since after accepting the money he will not be allowed to deny that he accepted the terms ⁵. Upon the same principle, if the debtor is silent, and the creditor communicates his intention at the time when he receives partial payment, which he could refuse without prejudice ⁶, the debtor is bound thereby ⁷. If neither declares his intention at the time of payment, each is presumed to make a continuing offer to assent to the subsequently expressed intention of the other, so that whichever first communicates his intention, controls

1 See *Fraser v. Locke*, 10 Grant Ch.(U. C.) 207.

2 *McDowell v. McDowell's Estate* 75 Vt. 401. The principal case is in accord with the civil law. Civ. Code of La. Art. 2166.

3 See *Munger, Application of Payments*.

4 *Terhune v. Colton*, 12 N. J. Eq. 232; *Simson v. Ingham*, 2 B. & C. 63.

5 *Anon*, Oro. Eliz. 69.

6 *Dixon v. Clark*, 5 O. B. 365.

7 See *Smith v. Wigley*, 3 M. & S. 174.

the application⁸. This offer to assent will not be presumed in the case of unreasonable preferences, as when the creditor attempts to apply to illegal⁹ or unmatured debts¹⁰; but it is probable that if at the time of payment the creditor communicated his unreasonable preference, and the debtor received the benefit of the creditor's acceptance of partial payment, the debtor would be bound. The test of reasonableness would also seem to furnish a rule, and reconcile the cases, as to the time at which the parties may apply. Accordingly, under ordinary circumstances, either party should be allowed to apply at any time, even after judgment¹¹, provided the question of the particular application has not been litigated; but most courts hesitate to go to this length¹². Another suggested result for which no authority has been found, is that when the debtor pays the exact amount of one of two equal debts, the creditor's intention would never to operative unless actually assented to by the debtor, since the creditor would have no right to impose terms on his acceptance.

The principle of presumed assent finds full scope in the case where neither party has at any time communicated his intention; then that application is presumed to have been agreed upon to which it is most probable that the parties would have assented¹³. Here certain rules of presumption have grown up, such as that the earliest items in a running account¹⁴, or the most precariously secured debts¹⁵, or the debts not yet barred¹⁶, shall be preferred; but these presumptions should be rebuttable¹⁷. For the essential distinction between the so-called common law and civil law rules is not that the one favors the creditor, the other the debtor, but that the civil law and other codes¹⁸ provide fixed rules of application, whereas at common law the application of a payment depends upon the agreement of the parties, actual or presumed. It follows that, strictly speaking, the court itself never applies a payment, but in all cases merely construes the acts of the parties.—*The Harvard Law Review*.

ENGLISH CASES.

(Taken from *Select English Cases*).

Road, Rule of—Saddle-horse—Duty of driver of carriage—Negligence.

The rule of the road as to keeping the proper side applies to saddle

8 *Huffman v. Cauble*, 80 Ind. 591.

9 *Phillips v. Moses*, 65 Me. 70.

10 *Early v. Flannery*, 47 Vt. 253

11 *Marsh v. Oneida Central Bank*, 34 Barb. (N. Y.) 298, *Contra*, *Smith v. Betty*, [1903] 2 K. B. 317

12 The weight of American authority requires, incorrectly, it is believed, that the debtor apply at the time of payment, the creditor before action brought. See 2 *Am. & Eng. Encyc.*, 2 ed., 444 ff. In England a creditor has been allowed to apply in the witness-box. *Seymour v. Pickett*, [1905] 1 K. B. 715

13 *The Martha*, 29 Fed. 708.

14 *Clayton's Case*, 1 Meriv. 585.

15 *Field v. Holland*, 6 Oranch (U. S.) 8. *Contra*, *Pond v. Harwood*, 139 N. Y. 111. *Qf. The Mecca*, [1897] A. C. 286.

16 *Estes v. Fry*, 166 Mo. 70. *Contra*, *Indian Contract Act*, § 61.

17 *The Mecca*, *supra*.

18 *Cal. Civ. Code*, § 1479; *Ga. Civ. Code*, § 3722.

horses as well as carriages; and if a carriage and a horse are to pass the carriage must keep its proper side, and so must the horse.

If the driver of a carriage is on his proper side and sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way and avoid an accident although in so doing he does go a little on what would otherwise be his wrong side of the road. *Turley v. Thomas*, 8 *Car and P.* 103: 56 *R. R.* 839.

Reversioner—Right of suit—Injury to land in occupation of tenant—Damage to reversion.

Building a roof with eaves which discharge rain water by a spout into adjoining premises is an injury for which the landlord of such premises may recover as reversioner while they are under demise if the jury think there is a damage to the reversion. *Barter v. Taylor*, 4 *S. E. C.* (O.S.) 13: 4 *B. and Ad.* 72; 38 *R. R.*, 227 distinguished. *Tucker v. Newman*, 11 *Adol and Ellis* 40; 3 *P. and W.* 14, 9 *L. J.* (N. S.) *Q. B.* 1; 3 *Jur.* 1145; 52 *R. R.* 276.

INDIAN CASES.

PRIVY COUNCIL DECISION.

Hindu Law—Will—Construction—Bequest to "daughters and their respective sons"—Restrictions of descent to male issues—Absolute or life-estate—Woman's estate—Survivorship between daughters—Spiritual benefit—Remainder over to sons—Gift over to daughters on failure of adoption—Succession Act (X of 1865), Sections 82, 116, 117.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate shall be retained in his family and it may be assumed that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. *L. R.*, 2 *I. A.* 7, (1874) followed.

In the Will of a Hindu drawn up in the English language and probably by an English Solicitor who was one of the attesting witnesses, it was provided, in case of the failure of a prior bequest in favour of a son to be adopted to the testator, (which bequest in fact failed) that the estate was to be made over to and divided between his two daughters in equal shares "to whom and their respective sons he gave, devised and bequeathed the same." There was a proviso that in the event of one of the daughters dying without leaving any male issue surviving the share of the deceased daughter was to go to the surviving daughter and her sons—to the exclusion in both cases of female issue. Further, that "in the case of the death of either daughter leaving sons the share of such daughter was to be paid to such her son or sons, share and share alike."

Held, That under the Will the testator's daughters whom he incontestably intended to benefit were to have no more than what is generally known to be a woman's estate in his property.

That the testator intended to create in their favour an estate for life with a remainder over to their sons.

That in the events that happened the daughters were entitled to the testator's estate in equal shares for life and with the benefit of survivorship between themselves -- *Radha Prosad Mullick v. Ranimoni Dassi*, *XII Calcutta Weekly Notes* 729 P. C.

MISCELLANY.

It is interesting to note that no less than 11 out of 27 death sentences passed in 1906 were commuted to penal servitude for life, four free pardons were granted, one sentence of penal servitude was commuted to imprisonment, remissions of various terms of penal servitude and imprisonment, etc., were granted to 269 persons, while 70 convicts were released on license in special cases at earlier dates than those allowed by the ordinary regulations. — *Law Students' Journal*.

DIVORCE CASES AND CO-RESPONDENTS.—Sir *Gorell Barnes* expressed, says the *Pall Mall Gazette*, a very sound view in the course of a divorce case which he disposed of recently. He had been asked to conceal the name of a co-respondent at a previous hearing, and declined to do so. The result of his refusal was a report of the case which led to the offer of important evidence. As the Judge said, the cases are rare in which it is not desirable on public grounds that the names of persons called before the Courts should be made known. Publicity has become an important aid to justice, and the soundest policy is to make no reservation on behalf of individuals unless it can be shown that there are other than merely private reasons for doing so. Every prisoner and most witnesses would like their names to be concealed, but the privilege cannot be given to all, and justice has higher claims than sentiment. It is rarely possible for a judge to determine when asked to conceal a name, whether some interest may not suffer if he consents to do so. — *Madras Law Journal*.

A 5-CENTURY OLD GERMAN LAW-SUIT.—A German law-suit which has been in progress since the year 1430 between the local authority of Friemar, a suburb of Gotha, and certain mill-owners in a neighbouring village, was amicably settled on February 17 after 478 years of constant litigation. The original cause of the suit, which has swallowed up enormous sums in law costs, was the action of the mill-owners in raising without authorisation the height of a dam in the River Nesse, in order to increase the supply of water to their mills. — *Madras Law Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 21ST & 28TH JULY, 1908. [Nos. 27 & 28.

APPROPRIATIONS TO RE-IMBURSE MUNICIPAL OFFICERS FOR EXPENSES INCURRED IN LITIGATION.

An appropriation to reimburse certain town officers who had made an arrest for the supposed violation of a local liquor law for their expenditures in a suit against them for false imprisonment, by which they were compelled to pay damages, was upheld in a recent Massachusetts case. *Leonard v. Inhabitants of Middleborough*, 84 N. E. 323. This reimbursement of municipal officers for expenses incurred in the supposed discharge of their duties may involve two considerations; for the validity of the expenditure of public money by a town or a city may be attacked on the ground that it is not within the corporate powers of the town or city as granted by the legislature,¹ or on the ground that it is not for a public purpose.²

The authorities are clear that it is within the power of a municipality to reimburse its officers for expenses incurred in litigation occasioned by lawful acts done in the course of duty.³ But the courts go further, and, as in the present case, sustain appropriations where the officers have committed a tort or other illegal act.⁴ Apparently the only limitations on this doctrine are that the officer must have incurred the liability while acting in good faith,⁵ and that the municipality must have a direct interest in the discharge of the particular duty.⁶ The courts adopt the theory that since a municipality may expend money for its own defense, it may make appropriations for its agent's defense,⁷ when the agent incurs a liability while acting for the municipality.⁸ But this theory merely indicates a method by which the municipality as principal may reimburse its agent if it is directly liable for his torts. And inasmuch as these cases of reimbursement arise only when the municipality

1 *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

2 *Loan Ass'n v. Topeka*, 20 Wall (U. S.) 655. See 21 HARV. L. REV. 277.

3 *Fuller v. Groton*, 11 Gray (Mass.) 340.

4 *Moorhead v. Murphy*, 94 Minn. 123.

5 *Cullen v. Carthage*, 108 Ind. 196.

6 *Vincent v. Inhab's of Nantucket*, 12 Cush. (Mass.) 103.

7 *Sherman v. Carr*, 8 R. I. 431.

8 *Babbitt v. Selectmen of Savoy*, 3 Cush. (Mass.) 530.

is not directly liable, the appropriations can be supported only by regarding the municipality as capable of discharging certain moral obligations.⁹ On principle, it is submitted that such a power is not within the strict construction of municipal charters universally demanded by the courts.¹⁰

The further question, whether or not these reimbursements serve a public purpose by making officers more efficient in the performance of their duties, is usually overlooked by the courts. It may be argued that personal liability for all unauthorized acts will result in such an excess of caution on the part of public officials as to interfere with the proper performance of their duties. On the other hand, reimbursement may cause wasteful carelessness. But ordinarily the courts refuse to declare appropriations public when the immediate purpose is the promotion of individual interest, even though the public welfare is ultimately furthered.¹¹ Accordingly, reimbursement would seem to be in its nature a gratuity and within the limitation.¹² On this ground the courts have declared invalid a statute authorizing municipal officers to obtain reimbursement for successfully defending suits brought to remove them from office.¹³ Such cases may be distinguished in that suits to remove from office are brought for criminal misconduct in office and are in their nature penal. But the underlying principle is the same whether the reimbursement is for a civil or criminal prosecution. However, since courts hesitate to interfere with municipal appropriations and will go far to find a public purpose, and in view of the authorities supporting appropriations for reimbursement, though the validity of the purpose was not questioned, it is unlikely that in future such appropriations, at least in civil cases, will be declared invalid.—*Harvard Law Review*.

ENGLISH CASES.

(Taken from *Select English Cases*).

Advertisement—Contract—Loss of Bank Note—Offer of Reward—Communication of information.

A party who had been robbed of bank notes put forth a handbill, wherein it was stated, that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 20?:" Held that the only person entitled to the reward was he who first gave information by which the notes were traced to the robbers, so as to ensure their conviction: and that it was not necessary that such information should be communicated to the party robbed, if it was given to a person authorized to receive it and to act upon it in the apprehension of the offenders as to a constable.—*Lancaster v. Walsh & M. and W.* 16: 1 *H. and H.* 258: 7 *L. J. (N. S.) Ex.* 209: 51 *P. R.*, 441.

⁹ *Trustees of Exempt Firemen's Fund v. Roome*, 93 N. Y. 313.

¹⁰ *Stetson v. Kempton*, 13 Mass. 271.

¹¹ *Lowell v. Boston*, 111 Mass. 454.

¹² *Mount v. State*, 90 Ind. 29.

¹³ *Matter of Chapman v. City of New York*, 168 N. Y. 80. *Contra*, *Laurence v. McAlvin*, 109 Mass. 311; *Hixon v. Sharon*, 190 Mass. 847.

Attorney—Privileged communication—Same attorney acting for Vendor and purchaser—Communication from Purchaser asking for time to pay money.

Where, upon the sale of an estate, the same attorney was employed by the vendor and by the purchaser, a communications from the purchaser to the attorney asking for time to pay the purchase-money, was held not to be privileged.—*Perry v. Smith* 9 *Meeson and Welsby* 681 : 11 *L. J. Ex.* 269 : 60 *R. R.*, 869.

Contract—Covenant by A not to sue defendant—Joint Debt due to A. and B.

A covenant by A not to sue defendant for any debt due from him to A, can not be pleaded as a release in bar of an action by A and B for a debt due to them jointly.—*Walmesley v. Cooper*, 11 *Adol and Ellis* 216 : 3 *P. and W.* 149 : 10 *L. J. Q. B.* 49 : 52 *R. R.*, 324.

Master and servant—Negligence—Driver—Hire of Carriage—Liability of Hirer—Hirer sitting on box and accepting control over Postilions.

A party, consisting of the defendant and others, hired for a day's excursion a carriage and post horses, driven by postilions who were the servants of the owner of the horses. The defendant rode upon the box. The postilions, in endeavouring to force their way into a line of carriages, overturned a gig, and seriously injured himself out as responsible for the accident and used expressions showing that he had a control over the postilions at the time it happened. Held, that he was liable in trespass.—*M'Laughlin v. Prajor*, 4 *M A N and G.* 48 : 4 *Scott, N. R.* 655 : 11 *L. C. P.* 169 : *Car and M.* 354 : 61 *R. R.*, 455.

Negligence—Contractor—Liability for Negligence of Sub-Contractor.

The liability by virtue of the principle of relation of master and servant ceases when the relation itself reliaes to exist ; and no other person than the master of such servant can be liable consequently, a third person entering into a contract with the master which does not raise the relation of master and servant at all, is not thereby rendered liable.

The defendant, a builder, was employed by the Committee of a club to execute certain alterations at the club-house including the preparation and fixing of gas-fittings. He made a sub-contract with B, as gas-fitter to execute this part of the work. In course of doing it through B's negligence, the gas exploded and injured the plaintiff. Held, that the defendant was not liable for this injury.—*Rapson v. Cubilt, a Meeson and Welsby*, 710 : 11 *L. J. Ex.* 271 : 6 *Jur* 606 : 60 *R. R.*, 873.

INDIAN CASES.

(PRIVY COUNCIL DECISION).

Evidence—Question of fact—Direct evidence on each side not wholly convincing—Necessary reliance upon surrounding circumstances.

Where in a suit in which the substantial question was whether a certain deed of mortgage represented a genuine transaction or a fictitious one, there was some evidence on each side bearing directly on the character of the transaction but on neither side was that evidence wholly convincing and persons who one might have expected to be prominent witnesses were not called and the evidence that was called was open to much adverse criticism, it had been found necessary in India and it was equally necessary for their Lordships to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct.—*Malip Singh v. Chaudhrai Nawal Kunwar*, 10 Bom., L. R., 600 (P. C.)

MISCELLANY.

The sale of a manuscript to a publisher authorizes its publication under the author's name, but this authority would seem to be limited to the precise matter written by the author, and to change it materially is to represent him as saying something that he did not in fact say, and he might thus be held up to the public as an object of ridicule or obloquy. There is a very perceptible difference between withholding the name of an author and exploiting him as the author of that which is not his. Literary property is probably to be governed by much the same rules as property of other kinds, and if authors wish to enjoy special rights and privileges in respect to productions which they have sold, they will doubtless find it necessary to provide therefor in their contracts.—*Law Notes.—Canada Law Journal.*

Practical jokes are all very well in place and season, although personally we do not favour them, but High Court judges should be above this kind of thing.—*Law Notes.*

THE PUNJAB LAW REPORTER.

VOLUME IX.] 7TH & 14TH OCTOBER, 1908. [Nos. 29, 30.

EXPERT EVIDENCE AS TO TYPEWRITING.

It has often been said that forgery is easy now that important documents are usually typewritten. Most people have supposed that the work of typewriters was so uniform that the substitution of one sheet for another could be made almost as a matter of course, with impunity. comparatively few lawyers are yet aware that, so far from this being true, the detection of forgery in a typewritten instrument is in most cases a matter of well-nigh mathematical demonstration. Doubtless, many forgeries of this kind have been successful, though suspected, because of the erroneous belief that proof of the forgery was impossible. There is a fascinating interest in studying the evidences of forgery in such cases because of the peculiar satisfaction in reaching in most cases a conclusion that is unmistakably true. It is true that detection of a typewritten forgery may be difficult, even impossible, if both the genuine and the spurious pages were written on the same machine and at very nearly the same date. Possibly this will be so if they are written on two machines of the same make, both of which are new. But different machines, even of the same make, will almost certainly have some minute distinguishing differences, and these will be rapidly exaggerated by use. The least slant of a letter, the slightest defect or peculiarity of any kind in it, may distinguish even a new machine from others, and, when used, some characteristics of this kind are certain to appear and increase with time. In case any of these peculiarities of a machine exist, its identification becomes a matter of certainty if a reasonable quantity of its work can be obtained for examination. A broken, bruised, or scarred letter, or one out of line, may positively identify the work of that machine during the period when such defect existed. And, if in a letter book or otherwise continuous samples of the work of the machine are available for inspection, it can be positively determined at what date this peculiarity of the machine first developed. Various defects of this sort appearing successive during a course of years make it possible to fix positively the time when any particular specimen of work done on that machine was made. In these and similar ways a competent expert can often prove to a demonstration that a forged document, or portion of a document, could not possibly have been made when and by the machine that made the genuine document. Perhaps no one has done so much to discover the possibilities of these proofs of forgery in typewriting as Albert S. Osborn, of Rochester,

New York, who has written articles during several years past in various journals showing by explanation and illustrations the certainties of proof in this class of cases. But the field is a large one, and there are already many experts able to detect and prove the existence of such forgeries. Yet, it is unfortunately still true that many attorneys are unaware of the extent to which this line of evidence has been developed, and, as a result, in some cases they permit typewritten forgeries to go unchallenged when they ought to be detected and proved spurious.—*Case and Comments.*

INDIAN CASES.

PRIVY COUNCIL DECISION.

Administration bond—Sureties liability—Letters of administration, obtained by fraud—Effect—Misappropriation by grantee—Sureties not parties to fraud—Revocation of grant.

Although letters of administration have been obtained by fraud, so long as the grant remains unrevoked, the grantee to all intents and purposes remains the administrator and he alone represents the estate and his receipts are valid discharges for all moneys received by him as administrator.

For his acts and defaults as administrator his sureties, though themselves not parties to the fraud or cognisant of it, are liable.—*Debendra Nath Dutt v. The Administrator-General of Bengal, XII Calcutta Weekly Notes, 802 (P. C.)*

Corporation—Bank of Bombay—Shareholders' register—Shareholders' right to inspect and take extracts—Special interest and definite object, necessary—Suit for declaration of right to inspect, in the nature of application for writ of mandamus—Conditions on which relief can be given.

A suit brought against the Bank of Bombay by a shareholder for a declaration that he is entitled to inspect the register of shareholders and to copy and take extracts from such register is, in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in such a suit.

A writ of *mandamus* will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused.

When, therefore, before the suit, the plaintiff claimed an absolute right to inspect and take extracts from the Bank's register of shareholders—to which he was not entitled—and was refused, but in the suit claimed a more qualified or restricted right.

Held, that the suit could not succeed.

The right to inspect the documents of a corporation, which at common law belong to every member of such corporation, is not an absolute right, but is confined to cases where the member of the corporation has in view some definite right or object of his own and to those documents which would tend to illustrate such right or object. Where it appeared that the plaintiff had no special interest in any of the matters he complained of or any interest other than, or different from that of each member of the corporation, and had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate, but his object was to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the Corporation's affairs.

Held, that no relief could be granted to the plaintiff.—*Rex v. Merchant Taylors Co.* 2 B. and Additional 115 (1831) *followed*.—XII Cal. W. N., p. 825.

REVIEWS.

Mozley and Whiteley's Law Dictionary. By Leonard H. West L.L.D. of the University of London, Late Tutor to the Law Society and F. G. Neave L. L. D. of the University of London, Gold Medallist, Solicitor, Author of 'A Handbook' of Commercial Law. Printed by William Clowes and Sons Limited and published by Butterworth and Co., 11 and 12 Bell Yard, Temple Bar, W. C.

The primary object of this work is to give an exposition of legal terms and phrases of past and present use. But as the mere exposition of a word or phrase would often be barren and unsatisfactory, the authors have in many cases, especially when dealing with the legal terms of the present day, added an exposition of the law bearing upon the subject-matter of the title.

To many of the titles which have reference to the historical portions of the law, the learned authors have also appended the Law Latin or Norman French words which were used as their equivalents by the mediæval lawyers when writing (as they did) in one or other of those languages respectively.

A catalogue of all the Reports with the abbreviations generally used to denote them is given under the Title 'Reports'. This useful catalogue occupies no less than 14 pages of the book. And the names of the principal current series are included.

The third edition of the work under review has been brought up to date by such references as seemed necessary to statutes passed during the four years which have elapsed since the previous

edition was published. A number of new Titles have been introduced with a large edition of Latin maxims and their translations. The get up of the book is excellent.

It may be had from the well known firm of Law Publishers, Butterworth & Co., 11 & 12 Bell Yard, Temple Bar, W. C. London.

Butterworth's Ten years Digest of Reported cases decided in the Supreme and other Courts issued under the general Editorship of Sidney W. Clarke, Esquire, Bar-at-Law, and printed by Bradbury Agnew and Company, and published by Butterworth and Company, 11 and 12 Bell Yard, Temple Bar, London 4 Vols.

Since this Digest includes practically every case reported during the years 1898-1907 as decided in the English Courts, together with a large number of cases from Scotland and Ireland, the Bench and the Bar in this country will find it very useful when they have to consult English authorities on a legal question. A striking feature of the work is the facility with which references may be made from one heading to another. The cases under each general heading are numbered consecutively and where the case note contains a reference to a case followed, distinguished, discussed, overruled or dissented from, such reference gives also the heading and number under which such case will be found.

Whenever a case deals with more than one subject it has been digested and inserted under the several headings, and cases that have been judicially noticed are specially indicated.

An alphabetical table of names of parties is contained in Vol. IV which also contains a list of 30 pages of Words, Terms and Phrases dealt with judicially during the ten years and alphabetical list of cases affirmed, reversed, overruled, followed, &c. All the more important headings have a separate table of contents prefixed, and no pains have been spared to render the work easy to use as well as accurate and comprehensive.

This comprehensive digest included in four excellently bound volumes, neatly printed on strong smooth paper, we are assured, contains more than 9,300 cases, many of which it is believed do not appear in any other digest. We have no hesitation in recommending the Digest to the profession.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 21ST & 28TH OCTOBER, 1908. [Nos. 31 & 32.

ALTERNATIVE RELIEF.

The English Judicature Act has enlarged the liberty of the plaintiff in claiming relief, for it is expressly provided that subject to certain regulations, alternate relief may be asked and several causes of action may be joined in the same statement of claim, the plaintiff may in addition ask for general relief. Fry J. in the case of *Cargil V. Bower* (10 Ch. D. 508) speaking of the prayer for further relief observed,

“Such a prayer must always be limited by two things, the facts which are alleged and the relief which is expressly asked. You cannot under a general prayer for further relief obtain any relief inconsistent with that relief which is expressly asked for.”

It has also been held that a plaintiff cannot fill two inconsistent characters. He could not claim to attack a Company for his own exclusive benefit as an individual and in same suit to sue the directors on behalf of himself and the other shareholders of the Company. This rule was laid down by Lord Westbury in the case of *Thomas v. Hobbler* (8 Jur N. S. 125). In this case the Judge observed “It is perfectly true that alternate cases may be presented by the same bill where they are not inconsistent with each other; but in order to maintain that proposition, it is necessary that the plaintiff should have one and the same character; and it can be true only when it is thus presented as a rule of the Court, that alternative cases may be embodied in one bill and alternate relief prayed, so long as the plaintiff retains the same individual character.” In *Lindsay v. Lynch* (2 Schoales and Lefroy p. 1.) the original bill prayed specific performance of an agreement to grant a lease to the plaintiff for three lives, the answer admitted an agreement for the lease of one life, that of the plaintiff. The plaintiff then amended his plaint, praying a specific execution of the agreement for a lease for three lives which lives were named in the bill; or in case the plaintiff should not appear under the circumstances entitled to a lease for three lives, it prayed that he might be entitled to a lease for the term of his own life. Lord Redesdale heard the case and held on the evidence that the plaintiff failed to prove an agreement for a lease for three lives, the learned Judge rejected the alternative prayer also.

Cawley v. Poole (1 Hemming and Miller 50) is an example of the rule that a plaintiff is not permitted to “approbate and reprobate” in the same case. In this case a judgment at law had been recovered against

the plaintiff in equity. Afterwards he entered into an agreement for compromise of the judgment debt. He then filed a bill alleging that the judgment had been improperly obtained and asking that the defendants might be decreed to enter up satisfaction upon it or if the court should be of opinion that the plaintiff was bound by the agreement, that the agreement might be performed. It was contended on the part of the defendants that the bill by seeking to set aside the whole transaction had precluded the plaintiff from praying specific performance of the agreement, the plea of defendants prevailed and the bill was dismissed.

In *Crenver f.c. Mining Co. Limited v. Williams* (35 Beaven 353, 361) the bill prayed that a deed of mortgage executed by the Company might be declared void. The court holding that it was valid was of opinion that the plaintiff could not be permitted to alter the frame of the suit and turn into a bill for redemption on payment of so much as was properly due.

If charges of fraud are introduced into a bill in addition to a case claiming relief on other grounds, relief may be granted, although the case of fraud made by the bill may fail. So much of the bill is to be dismissed as relates to the charge of fraud and relief may be given on the other part of the case which is established "What I understand to be the law" said Lord Cairns C in *Thomson v. Eastwood* (L. R. 2 App. Cas 243), "is this—where there is upon the face of the bill that which will give a right to relief in the court of equity, that right to relief is not destroyed by the circumstance that there are also in the bill allegations of personal fraud which might give a farther or a different right to relief if they were proved. The course which has been taken especially of late years as to such charge has been to dismiss so much of the bill as is founded upon charges of personal fraud and to dismiss it with costs"

In *Bagot v. Easton* (7 Ch. D. 1) the plaintiff alleged that he had been induced to enter into a partnership with the defendant by misrepresentation and therefore asked to have the contract cancelled or in the alternative that the defendant had afterwards so misconducted himself in the course of the partnership as to entitle the plaintiff to dissolution. A motion for an order confining the action to one or other causes of action in respect of which he sought relief was refused on appeal; reversing the decision of *Bacon v. C.* Lord Cairns L. C. said, "Independently of the Judicature Act I think this is exactly the kind of case in which so far as the pleadings are concerned, alternative relief may be asked for, in both alternatives the question arises between the same parties and mainly upon the same facts. The plaintiff tells a story which may or may not be supported by evidence, and he asks upon certain facts alleged that a particular agreement for partnership may be rescinded on the ground of fraud or if the court shall not be of opinion that the facts justify such a decree that upon certain additional facts alleged he may be entitled to a dissolution of the partnership on the ground of the defendant's conduct. I am at a loss to conceive how there is anything inconsistent in point of pleading in joining these claims together. Before the Judicature Act I think this form of claim would have been allowed. But the Judicature Act has enlarged the liberty of the

plaintiff in claiming relief, for it has expressly provided that subject to certain regulations alternative relief may be asked and several causes of action may be joined in the same statement of claim."

In *Cargill v. Bower* (10 Ch. D 502) Fry J. held that the plaintiff may claim rescission of a contract and indemnity against future liability under it; for rescission may not be granted at the hearing, and liability may accrue under the contract before the hearing.

The following rules are deducible from authorities.

1. A plaintiff must recover *secundum allegata et probata* particularly in case of fraud (*Cargill v. Bower* 10 Ch. D. 508).
2. He may not "hover between two inconsistent alternatives not distinctly averring either." *Rawlins v. Lambert I J and H* 458 *Davy v. Garret* 7 Ch. D. 489.
3. But he might always state the actual facts and ask the court to draw one conclusion of law from them or another, even though the conclusions may be inconsistent (*Rawlins v. Lambert I J and H* 458, *Evans v. Davies* 10 Ch. D. 747., and it should seem that now if he states separate issues of fact though inconsistent with one another, he may elect at the hearing which he will try.
4. If he claims to fill two inconsistent characters, he will have to elect at the hearing which claim he will rely on (*Thomas v. Hobler* 8 Jurist N.S. 125).
5. He may not approbate and reprobate the same transaction *Cawley v. Poole I H and M* 50, *Re Itory* 10 Ch. D 372.
6. He may not make a new case at the hearing which entirely alters the nature of the case made, *e. g.*, he cannot change a claim for continuance of tenancy into one for damages for eviction (*Newby v. Sharpe* 8 Ch. D. 49).
7. He may charge a case of fraud and a separate case for relief on other grounds. And even though the charge of fraud fails, that will not debar him from obtaining relief on the separate issue (*Thomson v. Eastwood*, 2 App. Cas 215).
8. But he cannot charge actual fraud alone and, that failing, obtain relief inconsistent with it (*Wilde v. Gibson I H of L. Cas* 605).
9. If plaintiff alleges one version of the facts and defendant alleges another version of them inconsistent with plaintiff's, plaintiff cannot, if he maintains his original case, first take the chance of proving his own version and then fall back upon that alleged by the defendant (*Lindsay v. Lynch* 2 Schoales and Lefroy I).

10. It should seem that where the plaintiff has to elect between two alternative cases, and fails to prove that on which he elects to rely, the dismissal of his action should be without prejudice to the relief, which was not tried (*Hartridge v. Hartridge*, *Solicitors Journal* Vol. 24, p. 405).

By order XVI, Rule i, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly or severally or in the alternative, likewise all persons may be joined as defendants against whom the right to relief is alleged to exist whether jointly, severally or in the alternative (*Rule 3, order XVI*). In actions brought under this new rule against more defendants than one, the facts relied on in order to charge A may be inconsistent with those relied on in order to charge B. The plaintiff need not elect between the two defendants, but may try his case against both, the order of trial being on the discretion of the Judge (*Child v. Stenning* 7 Ch. D. 414). This case was followed in *I. L. R. VIII Cal. 170*).

According to the Indian Civil Procedure Code, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly, severally or in the alternative in respect of the same cause of action (Sec. 26). Likewise all persons may be joined as defendants against whom the right to any relief as is alleged to exist whether jointly, severally or in the alternative in respect of the same matter (Sec. 28)]. The words "matter" and "cause of action" used in these two sections have been explained in *I. L. R., V. All., 163*, *I. L. R. II All., 33*.

In a suit in which the plaintiff claimed to enforce the mortgage made in his favour by the defendant, at the trial of the case, it was found that the mortgagor was a minor; thereupon the amendment of the plaint was prayed for to include in the alternative a relief on the ground of fraud of the defendant in misrepresenting his age, the amendment was granted by the first court, in appeal the learned Chief Justice, Sir Francis Maclean, observed—

"It is urged by the appellant that the conversion of this suit from a suit to enforce a mortgage into a suit for the recovery of money paid upon the footing of a false representation is the conversion of a suit of one character into a suit of another and inconsistent character. No doubt in one sense the original character of the suit was to enforce the mortgage, but the object of the suit was after all to recover the money. We must read the proviso with other sections of the Code and particularly with sections 42 and 45 It seems to me that if the argument of the appellant were to prevail, it would virtually prevent an alternative case which arises out of, and is immediately connected with, the same transaction from ever being raised in the same suit. I do not think looking at the sections of the Code I have referred to that that was the intention of the Legislature, nor do I think that the alternative claim which is set up is inconsistent with the character of the claim originally made within the meaning of the proviso in question. Reading sections 42 and 45 of the Code the intention of the Legislature was

"that, as far as possible, all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit, and I do not think that the proviso to section 53 was intended to interfere with this." *I. L. R. XXV Cal. 371 at pp. 389—390.*

In *Buddres Dass v. Hour Miller & Co.* (*I. L. R. VIII Cal 170*) the plaintiff brought a suit to recover certain sums of money from the defendants, due to them under certain contracts which they alleged had been entered into by themselves and one *A D* as agent of the defendants' and asked for an account. The defendants in their written statement contended that there was no privity of contract between themselves and the plaintiffs and denied the alleged agency of *A D*. The plaintiff before the hearing applied to the court to have *A D* added as a party defendant under Sec. 28 of Act X of 1877, asking to be allowed to amend their plaint so as to pray for relief in the alternative against the original defendants or the said *A. D.* Held, that under Sec. 28 they were entitled to the order on authority of the case of *Child v. Stennirg* (*L. R. 5 Ch. D. 695*).

Under similar circumstances an alternate claim was allowed in *Raj-dhar Choudhry v. Kali Kristna Bhattacharya*. *I. L. R. VIII Cal. 963* (compare also *I. L. R. XII Cal. 555*).

The Punjab Chief Court held in *P. R. 109* of 1887 as follows:—

"A plaint alleging first four bonds were executed by defendant in lieu of certain earlier bonds and interest, and then alleging that said bonds were not executed and earlier bonds remained in force is bad in law. It would have been otherwise if the later transaction had been alleged to be a nullity by reason of matter of law only, the facts first alleged not being disputed or negatived as in such case there would be no real contradiction nor an allegation of two sets of inconsistent facts."

A mortgagor who institutes a suit for redemption of the mortgaged property is entitled to put on an alternate claim before the court. He may aver that the mortgage money has been repaid, and in the alternative, in the event of court finding any sum to be still due under the mortgage, that he is prepared to pay such further sum. *Butchana v. Varahalu* *I. L. R., XXIV Madras p. 408.*

Under Sec. 37 of the Specific Relief Act a plaintiff instituting a suit for specific performance of a contract in writing may pray in the alternative that if the contract cannot be specifically enforced it may be rescinded and delivered up to be cancelled; and the court if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

PANDIT SHEO NARAIN.

REVIEW.

Real Property. An Introductory Explanation of the Law relating to Land, by Alfred F. Topham, LL. M. Esquire, Bar.-at-Law, with Test Questions for the use of Students, by F. Porter Fausset B. A., LL. B., Bar.-at-Law—Printed by William Clowes and Sons Limited, London and Beccles, and published by Messrs. Butterworth and Co. 11 and 12 Bell Yard, Temple Bar., London.

This book is intended primarily for students. So far as it deals with the law of the present day, the author believes that it covers the whole ground, at any rate in outline, and will probably be found sufficient in itself for the purposes of Law Special at Cambridge and other similar Law examinations.

The author does not claim the work will be sufficient in itself for students desiring to obtain honours, as in the Cambridge Law Tripos, or the Bar Finals, though he hopes the book will be useful for these students also as a first explanation of this very intricate subject. With that end in view full explanations have been inserted of the more difficult rules with frequent illustrations chiefly by way of cases actually decided.

The law relating to land is the most difficult branch of English Law, and the present treatise does not obviate the necessity of study of larger works on real property which one must study before he can consider that he has acquired even a working knowledge of English law of land. This does not diminish the usefulness of the book under review which we unhesitatingly recommend to those who are desirous to gain elementary knowledge of this branch of Law. The get-up of the book is excellent.

INDIAN CASES.

(PRIVY COUNCIL DECISIONS.)

Practice—Concurrent findings—Question of fact—Considerations of law involved in the process of reasoning—Jhum cultivation, nature of—Regulation III of 1891, the Sylhet Jhum Regulation—Its application to lands long enjoyed by the appellants—Effect of Government's claim to confiscate proprietary rights—Burden of proof—Talugs, permanently settled—Profit of jhum lands included in assessing the talugs—Regulations that no assets arising out of the estate could be lawfully taken into account in permanently settling the jumma of the estate—Presumption that in any individual case the course in accordance with law had been followed—Preamble of Regulation III of 1891—Consideration of each case on its merits—Absolute proprietary title—Evidence to establish the same—Long possession and enjoyment.

Their Lordships were unable to accept the contention that the question whether certain *jhum* lands lay within or without the limits of the settled estates was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India because, in a sense, the question was one of fact; but at every point in the process of the reasoning considerations of law had to be regarded.

The following description of the nature of *jhum* cultivation explained in an early official document relating to the hill lands in suit, seemed to their Lordships to be correct to the present day:—

“The *dastur* of *jhum* cultivation is this: *jhum* is not cultivated in one place every year. When land is found anywhere within these boundaries *jhum* cultivation is made thereon, and after measurement and assessment the *Mirasdars* take the rest by apportionment according to their respective share in the *jhum* revenue at the time of the *hasbud* measurement.”

Where the Government claimed to apply to the lands, which had undoubtedly been long in the enjoyment (such enjoyment as was practically possible under the circumstances of the case) of the appellant's predecessors-in-title, Regulation III of 1891, which would have the effect of confiscating proprietary rights, and giving compensation in exchange, their Lordships thought it clear that it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation—in other words, that the case was one in which, at the Permanent Settlement, in making settlement of certain taluqs with the appellant's predecessors-in-title, the officers of Government included, for the purposes of assessment, among the assets of those taluqs, the income derived by their owners from *jhum* cultivation carried on beyond the limits of the settled estate.

The *taluqs* held by the appellants were settled at the Permanent Settlement, and in estimating the assets of those *taluqs* the profits of the *jhum* lands in suit were then brought into account. According to the appellants those profits were taken into account because the *jhum* lands in suit formed part of the settled estate; while, according to the Government, the *jhum* land profits were taken into account as assets accruing to the owners of the settled estates, but derived from lands lying outside it. It was contended by the appellants that, under the regulations in force at the time of the Permanent Settlement, no assets could be lawfully taken into account in settling the *jumma* of an estate, except those arising out of the estate itself, and that that consideration established a very strong presumption that in any individual case the course in accordance with law had been followed.

Held, that the contention was effectively met by a reference to the preamble of Regulation III of 1891, which showed that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable.

Held, also, that it must be considered, in each case that came before the Courts, whether the facts bring the case within the operation of the Regulation.

The appellants relied upon the evidence of possession and enjoyment as proof of their title, *i. e.*, their absolute proprietary right in respect of the lands in suit. That evidence showed that from as early as 1837 the appellants' predecessors-in-title received *kabuliyats* from persons carrying on *jhum* cultivation on the lands in suit; that in 1842 and 1843 those predecessors-in-title succeeded in defeating an attempt to exercise rights over those lands on the part of persons interested in an adjoining *Mauza*; that on several occasions in subsequent years the appellant's predecessors successfully resisted proposals on the part of Revenue Officers of Government to settle portions of those hill lands as *ilam* lands open for settlement that the most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue authority in the Province) dated the 14th September 1855, that the lands in suit were included in the Permanent Settlement; and that after that the possession and enjoyment of the appellants and those through whom they claimed seemed to have been continuous.

Held, that the appellants established their title, and that a decree should be made granting the appellants the declaration asked for by the plaint:—*Mahomed Ali Haidar Khan, versus the Secretary of State*, 10 Bom. L. R. p. 1101.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 7TH & 14TH NOVEMBER, 1908. [Nos. 33 & 34.

RECOVERY OF PAYMENTS MADE UNDER COMPULSION.

The general rule is that one cannot recover money voluntarily paid with full knowledge of the facts, although the claim in satisfaction of which the payment was made was, in fact, illegal.¹ The policy of law denies that a man may take inconsistent positions, repudiate his acts, and disturb a settlement voluntarily made by him, even though no sufficient consideration was received.² But this objection is not applicable to acts done under compulsion. It is therefore well settled that in the absence of consideration payments made involuntarily or under compulsion may be recovered at law. Recovery is founded, not, as in equity, on a rescission through the unfair advantage taken, but on a quasi-contract through failure of consideration. The effect of the compulsion is simply to explain the apparent inconsistency of the payment and the repudiation.³ This rule mitigates the harshness of the narrow common law doctrine of duress. For whereas the equitable doctrine of undue influence is broad and sweeping, extending to all transactions in which one party has been deprived of free and deliberate judgment,⁴ the common law doctrine of duress is limited to actual coercion, by injury to, or unlawful imprisonment of, the person, or threats of such injury or imprisonment.⁵

The test for determining what amounts to such compulsion as will justify a recovery under the rule must of necessity be somewhat vague, considering the infinite variety of possible situations. "There must be some actual or threatened exercise of power possessed, or believed to be possessed, over the person or property of another, from which the latter has no other means of immediate relief than by paying."⁶ Hence it has been held that a payment is involuntary if made to prevent a wrongful taking or detention of the plaintiff's property,⁷ or to avoid injury to the plaintiff's business,⁸ or to induce the defendant to perform a duty.⁹ But in any event, although all the cases are not clear on the

1 *Elston v. City of Chicago*, 40 Ill. 514.

2 *Peters v. R. R. Co.*, 42 Oh. St. 275.

3 *Follock, Contracts*, 3 Am. Ed. 782.

4 *Williams v. Bayley*, L. R. 1 H. L. 200.

5 *Skate v. Beale*, 11 A. & E. 983.

6 *Radich v. Hutchins*, 95 U. S. 210; *Brumagin v. Thillingham*, 18 Cal. 265.

7 *Baldwin v. Liverpool, etc.*, S. S. Co., 74 N. Y. 125.

8 *Swift & Co. v. U. S.* 220.

9 *Dew v. Parsons*, 2 B. & Ald. 562.

point, there must be some necessity actually existing or reasonably believed by the plaintiff to exist; otherwise he could withhold payment for a determination of the dispute at law. Failing that he has no excuse repudiating his act.

In a recent case a subscriber, with full knowledge of the facts (though probably not of the law) and without objection paid a telephone company a higher rate than it could legally charge. It was held that he could not recover. *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535. The absence of protest is not fatal to recovery, just as its presence will not make an otherwise voluntary payment involuntary.¹⁰ It is effective merely as evidence tending to show that compulsion was the inducing cause of the payment.¹¹ When the parties stand on unequal footing, as often happens in the case of a public service corporation and an individual, there is great opportunity for compulsion, and hence there may frequently be a recovery.¹² But the case seems correct in holding that the mere fact of inequality does not, as a matter of law, render the payment compulsory. If one objects that the result is unjust to the plaintiff, he should quarrel not with the refusal of the court to extend the doctrine of compulsory payments, but with the rule which denies recovery of a payment made under a mistake of law.¹³ To recover on the former ground, the plaintiff should show not only the opportunity for compulsion, but that in fact compulsion was exercised and did induce the payment.

INDIAN CASES.

(PRIVY COUNCIL DECISION).

Malicious Prosecution, suit for, damages for—Principles applicable to the case—Prosecutor—Malice the foundation of the action—When may malice be shown—Knowledge of the defendant as to the falsity of the charge—Liability in such a case.

In an action for damages for malicious prosecution, the person who can be made liable is the prosecutor.

The determination of the question, as to who the real prosecutor is, depends upon all the circumstances of the case. The mere setting of the law in motion is not the criterion, nor is it enough to say that the prosecution was instituted and conducted by the police; the conduct of the complainant, before and after making the charge, his means of information and motives, must also be taken into consideration.

The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry; a prosecution commenced *bona fide*, may become malicious in any of the stages through which it has to pass.

Narsinga Row v. Muthaya Pillai (I. L. R. 26 Mad. 362), explained and distinguished, *Fitz John v. Mackinder* (G. C. B. N. S. 505 followed) *Pandit G. Parshad Tewari v. Sardar Bhagat Singh*, 8 Cal. 1, J., 337.

10 *Lamborn v. Commissioners*, U. S. 181.

11 *Wespe v. Land & Mortgage Co.*, 3 N. D. 160.

12 *G. W. Ry. Co. v. Sutton*, L. R. 4 H. L. 226; *Peters v. R. R. Co.*, *supra*; *R. R. Co. v. Coal Co.*, 79 Ill. 121.

13 See 21 HARV. L. REV. 225.

MISCELLANY.

DARING BANK RAID BY MOTORISTS—A daring bank robbery was committed in the most approved "Wild West" style at Neupeest, a suburb of Budapest, recently. Four well-dressed young men drove to the branch establishment of the Hungarian Commercial Bank in a motor car, and entered the building. Two of them immediately barred the doors, while the others covered the clerks with revolvers and ordered them to hold up their hands. The clerks obeyed promptly, but the cashier shouted "robbers" and tried to reach the door of the inner office. One of the bandits shot at him, and then felled him with the butt of his revolver. The Bank Manager, who appeared in response to the cashier's cry, was ordered to hand over all the cash, amounting to more than £2000. While the manager was transferring the note and specie across the counter, one of the robbers cut the telephone wires with a knife. The raiders then disappeared, after threatening to shoot the clerks if they followed. They locked the doors from the outside and disappeared in their motorcar. The police have been unable to secure any trace of them, although, from the accent with which they spoke Hungarian, they are believed to be Italians.

PROFESSIONAL ETHICS.—"You will have to send for another doctor," said the one who had been called, after a glance at the patient. "Am I so sick as that?" gasped the sufferer. "I don't know just how sick you are", replied the man of medicine, "but I know you are the lawyer who cross-examined me when I appeared as an expert witness. My conscience won't let me kill you, and I'll be hanged if I want to cure you Good-day." *Philadelpia Ledger*. (G. B.)

EXPLAINED.—"You state in one place that you were born in 1884?" "Yes Sir." "And in another that you were born in 1885?" "Yes, Sir." "Isn't that inconsistent?" "On, no," smiled the witness. "I was born in 1884, and just stayed born. Why I'm born yet." Then the great lawyer had to recognize that a novelty had been sprung on him. —*Green Bag*.

A COMMISSIONER.—Most of the members of the Bar have heard of various kinds of "commissioners", for example, Commissioners of Corporations, Transit Commissioners, Police Commissioners, and, in Boston, the Finance Commissioners, but a witness in the Superior Court the other day extended the name to still another line of work.

He gave his occupation as "Commissioner", and on direct examination it was left that way. On cross, examination, however, counsel was inquisitive and asked what his duties were, with the result that the witness proved to be a man, who, on hearing of an accident, saw the injured party and secured the case for some lawyer and received for his services a *commission* on the amount recovered. Or, as counsel unfeelingly put it, he was an "ambulance chaser."—*The Green Bag*.

SOBER AS THE JUDGE.—Judge Boyd of the Irish bench kept a supply of his favorite "pizen" on the desk before him in an inkstand of peculiar make. When he wanted a sip he took it through a quill pen, while counsel professed entire ignorance of the little manoeuvre. "Tell the Court truly, he once said to a witness, were you drunk or sober?" "Quite sober, my lord," replied the man. And his counsel added, with a look at the inkpot: "As sober as a judge."—*Pall Mall Gazette. The Green Bag.*

CONFLICTING EVIDENCE.—The venerable and learned Justice John M. Harlan, during a game of golf at Chevy Chase, explained the intricacies of evidence to a young man.

"Usually, in conflicting evidence," he said, "one statement is far more probable than the other, so that we can decide easily which to believe."

"It is like the boy and the house hunter."

"A house hunter, getting off a train at a suburban station, said to a boy:

"My lad, I am looking for Mr. Smithson's new block of semi-detached cottages. How far are they from here?"

"About twenty minutes!" exclaimed the house hunter. "Nonsense! The advertisement says five."

"Well," said the boy, "you can believe me or you can believe the advertisement; but I ain't tryin' to make no sale."—*Washington Star.*

THE PUNJAB LAW REPORTER.

VOLUME IX.] 21ST & 28TH NOVEMBER, 1908. [Nos. 35 & 36.

PSYCHOLOGY AND CRIME.

Professor Hugo Muensterberg of Harvard University, gave a most interesting address on "Psychology and Crime," at the City Club in Chicago. He then advanced some new theories for the detection of criminals by psychological methods.

"The mere fact that a suspect shows excitement when he is being questioned may mean nothing, especially as long as we cannot tell whether the excitement is due to the crime or the strain of the criminal procedure," said Professor Muensterberg. "But if he becomes excited suddenly when the name of a hidden accomplice or the location of the crime is mentioned, this ought to have considerable value. To determine the existence of such mental excitement, we have in the past depended on instrument to measure the acceleration of the pulse, or quicker breathing, or muscular twitching. But these are comparatively crude, and with a new method we can determine the most subtle mental excitement, so slight that none of these instruments would note it. This is by means of a galvanometer, which measures the body's resistance to an electric current passing through it. I have determined that the sweat glands in the skin are under the influence of the emotions, and so, by placing the electrodes in the hands of the person to be examined, the resistance of the skin to the current will betray even the slightest emotional changes.

"The courts so far have had little to do with psychologists, and the farthest psychology has been applied in any of them is to refuse to trust the optical impressions of a witness who is totally blind or the accoustic reports of an absolutely deaf man. The subject of variations of memory has had no place in criminal procedure. Even an oath means nothing in this way, for I have found by experiments that the subjective feeling of intensified memory which it seems to encourage in no way makes a witness state from the tricks of the memory. Hypnotism has figured in the courts, but the popular impression has, as usual, been wrong. No man can be hypnotized into committing a crime.

"An interesting way of detecting crime might be known as the association of ideas method. Every time a word is spoken the hearer at once associates some other idea with it. I say 'door,' you think of 'house' or 'room,' or whatever other notion fits first into your head. To show you

how this will work in the detection of crime, let me tell you of an experience I had. A suspect had been brought to me for a psychological test. He was perfectly frank and said he did not even know why he should be suspected of anything wrong. I repeated to him a list of 100 common words and asked him to name the first thing that occurred to his mind in connection with each word. Then I noted the length of time it took him to answer by means of a stop watch. Out of the 100 words he replied to 94 with normal swiftness, between three-fifths and one and one-quarter seconds. But there were six words at which his mind halted for more than two and a half seconds. He did not know that he took longer to answer to these words, nor did he know that I noticed it. But the words were 'money,' 'bank,' 'check,' 'forger,' 'prison,' 'theft.' Future criminal proceedings were the results of this test.

"I have found that any man who has committed a crime always keeps in the background of his mind the memory of that crime as an idea he wants to suppress. When anything is suggested which in any way is connected with the idea he is trying to suppress, his mind becomes confused and slow. Or it may become unduly excited, and he may blurt out a word suggested only because of the crime. Such a test is one against which no shrewdness of the witness and no skill of his lawyer can protect a suspect. The more he tries to guard himself the more certain he is to betray himself.—*Criminal Law Replenisher*.

MISCELLANY.

A prisoner at the sessions had been duly convicted of theft, when it was seen, on "proving previous convictions," that he had actually been in prison at the time the theft was committed. "Why didn't you say so?" asked the judge of the prisoner angrily. "Your Lordship, I was afraid of prejudicing the jury against me."—*Law Notes*.

A provincial paper, the other day, "dug up" the old story—which, however, will bear repetition—of Robert Smith, brother of Sydney, Smith, and a successful lawyer, who on one occasion engaged in an argument with a physician over the relative merits of their respective professions. "I don't say that all lawyers are rogues," said the doctor, "but you'll have to admit that your profession doesn't make angels of men." "No," retorted Smith; "you doctors certainly have the best of us there!"—*Law Notes*.

The same paper, we think, gave the story of the distinguished barrister who said to his wife at dinner: "I am tired to death!" "You look tired," responded his wife sympathetically. "What's the matter?" "I've been delivering my speech for the defence for three days now, and, tired or not, I shall have to continue it to-morrow and perhaps the

next day." "Can't you cut it short?" "Not until the jury have had time to forget the evidence against my client!"—*Law Notes*.

A barrister, noticing that a judge had gone to sleep, stopped short in the middle of his speech. The sudden silence woke the judge, and the lawyer gravely resumed, "As I remarked yesterday, my lord——." The puzzled judge stared, as though he had been asleep since the previous day.—*Law Notes*.

SOLOMON TO THE RESCUE—A., an implement agent, induces B. to buy a machine from him and takes his note for \$100. A. then fills up three more of his blanks, facsimiles, forges B.'s name to them and discounts them all at different banks. When the time comes B. receives four different demands for payment of his notes. He is an illiterate farmer and he can't "for the life of him" tell which is the genuine note, i.e., the one that he signed. All the banks threaten suit. The only evidence that can be offered is B.'s own, and that is no use. A comparison of the different documents results in the observation that he "can't tell t' other from which." The reader is requested to give his opinion as to the rights of the various parties, stating reasons.—*Canada Law Journal*.

A CASE is reported from the Yarmouth County Court, in which the landlady of a seaside lodging house, who had let her rooms at four guineas a week, including attendance, refused to supply hot water in a morning, presumably for shaving and washing, unless it was paid for as an extra. The judge held that hot water in these days is as necessary as sheets in the beds, and that the lodger was justified in leaving forthwith.—*Law Students Journal*.

THERE has been a practice in some criminal cases to impose no punishment, or only a mitigated penalty, upon an undertaking that the culprit should emigrate to some colony for the purpose of starting life afresh. Australia and Canada have protested against this, on the broad footing that the colonies do not want undesirables dumped on them, and the Home Secretary has issued a circular with a view to stopping this practice.—*Law Students Journal*.

It had been a long and tedious case, commencing first in the day's list and finishing in the dusk of the late afternoon. Judge, counsel and everybody were heartily sick of it, and the jury were now considering their verdict. They were considering long and earnestly and the minutes ticked by and still no conclusion was come to. The judge anxiously enquired whether there was any point upon which he could enlighten them, when like a thunderbolt came back the question: "M'Lud, two of

us hasn't been sworn and we have been trying to find out what was the best thing to do."—*Law Students Journal*.

WE cull the following three stories from the amusing pages in the November number of *The Green Bag*, which appear under the heading of *The Lighter Side*:—A trial, unique in its nature, was held before Justice of the Peace Moyer last Tuesday. A man whose name is Silver, with others, was charged with the larceny of a lot of brass which it was claimed belonged to the Southern Railway Company. Mr. Silver was represented in the trial by Attorney Thomas J. Gold of High Point. In other words, Silver was defended by Gold for stealing brass. This would be called by metallic experts as try-metalism. There was not sufficient evidence to hold him and Silver was made "free."—*Law Students Journal*.

A LAWYER once asked a man who had at various times sat on several juries, "Who influenced you most—the lawyers, the witnesses, or the judge?" He expected to get some useful and interesting information from so inexperienced a jurymen. This was the man's reply: "I'll tell yer, sir, 'ow I makes up my mind. I'm a plain man, and a reasoning man, and I ain't influenced by anything the lawyers say, nor by what the witnesses say, no, nor by what the judge says. I just looks at the man in the docks and I says, 'If he ain't done nothing, why's he there?' And I brings 'em all in guilty."—*Law Students Journal*.

A STORY, said to be characteristic, is told of an Arkansas judge. It seems that when he convened court at one of the towns on his circuit it was found that no pens, ink, or paper had been provided, and, upon inquiry, it developed that no county funds were available for this purpose. The judge expressed himself somewhat forcefully, then drew some money from his own pocket. He was about to hand this to the clerk, when a visiting lawyer, a high-priced, imported article, brought on to defend a case of some importance, spoke up, in an aside plainly audible over the room.

"Well," he remarked with infinite contempt, "I've seen some pretty bad courts, but this—well this is the limit!"

The old judge flushed darkly.

"You are fined \$25 for contempt, sir! Hand the money to the clerk!" he said; and when the pompous visitor had humbly complied, he continued:

'Now, Mr. Clerk, go out and get what pens, ink, and paper the Court may require, and if there is anything left over you can give the gentleman his change.'—*Law Students Journal*.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 7TH & 14TH DECEMBER, 1908. [Nos. 37 & 38.

POWER OF THE JUDICIARY OVER CONTROVERSIES INVOLVING POLITICAL QUESTIONS.

Since the time of Littleton it has been established law that the decision of political questions is without the province of the courts.¹ But a difficulty arises in determining what are political questions. In this country they would seem to be questions expressly reserved by the Constitution to either the executive or the legislature, and questions which are by the necessary implication of the Constitution so reserved—that is, questions the decision of which by the judiciary would obviously embarrass the action of the executive and legislature within their respective spheres, or which, owing to the superior sources of knowledge of the other two branches, the courts are ill-qualified to decide. Among such are questions as to the jurisdiction of different sovereignties,² the duly constituted government of a state,³ and the status of Indian tribes.⁴

A crucial issue arises where a court is called upon to determine the rights of individuals to property within its jurisdiction when the decision necessarily involves the determination of a political question. As to international questions it is a well-settled rule of international law that municipal courts may determine the title to property situated within their jurisdiction, even though a political question is involved.⁵ Accordingly, a foreign sovereign having property within the jurisdiction is amenable to the court's control, since by becoming the owner of the property he has incorporated himself into the juridical system under which he holds it and since a suit against him can be carried on without interfering in any way with any property necessary to the proper discharge of his functions as a sovereign.⁶ In accord with this rule is the opinion of a recent case in India which confirms the right of the courts of British India to adjudicate the title to property situated therein belonging to a native prince not subject to the court's jurisdiction, in spite of the fact that the rules governing the descent of the property were the same as those governing the succession to the throne. But, on finding that the real

¹ Wambaugh's Littleton's Tenures, Intro. xxxiv, xxxv.

² Williams v. Suffolk Ins. Co., 13 Pet. (U. S.) 839; State v. Wagner, 61 Me.

Foster v. Neilson, 2 Pet. (U. S.) 253.

³ Luther v. Borden, 7 How. (U. S.) (1).

⁴ Farrell v. U. S., 110 Fed. 942, 951.

⁵ Neel Kisto Deb v. Beer Chunder, 12 Moore's Ind. App. 523, 534.

⁶ The Charkieh, L. R. 4 Ad. & Ecc. 59, 97.

object of the suit was to settle the succession, and that the property right involved was only contingent, the court denied its jurisdiction. *Shamarendra Chandra Deb Barman v. Birenda Kishore Deb Barman*, 12 Calcutta W. N. 777 (Calcutta High Ct., May 21, 1908).

Similarly the United States Supreme Court has held that a mere assertion of property rights will not give jurisdiction over a political question where the assertion is merely added for the purpose of giving jurisdiction.⁷ Accordingly, it would appear necessary that the property rights be not remote. Yet the Supreme Court held in a leading case that in boundary disputes between the states, the state's right of escheat to the property within its borders is a sufficient property right to render the question one for the judiciary, and that the sovereignty and jurisdiction of the states is merely incidental to the property rights involved.⁸ The English cases relating to counties palatine⁹ and to colonial governments¹⁰ are cited as authority for this position. But in those cases the English courts had jurisdiction not of causes between states, but of causes arising out of agreements between English subjects, who, when residing within the jurisdiction of the English courts, were, as English subjects, amenable to the processes of those courts. It is further reasoned¹¹ that a political question becomes a judicial one when submitted to the courts; but this reasoning should not have been applied where the defendant state submitted to the court's process by appearing and pleading, and then later moved a dismissal for want of jurisdiction.¹² The decision of the Supreme Court that its jurisdiction extends over boundary disputes between the states is settled law.¹³ It is submitted, however, that the dissenting opinion of Chief Justice Taney¹⁴ in the leading case contains the preferable view—that such disputes are political questions where the suit is not brought to try a right of property in the soil, but is rather brought to enforce the mere political jurisdiction of the state.

ENGLISH CASES.

(Taken from Select English Cases).

Attorney and Client—Undue Influence—Purchase from Client—Duty to advise—Fact likely to increase value of property.

On a question of the propriety of a purchase by a solicitor from his client, the solicitor, in order to sustain the transaction, must, if he was solicitor *in hac re*, show that he gave his client all that reasonable advice against himself, which his office of solicitor would have made it his duty to have given him against a third person; but the nature of the proof varies according to the subject of the purchase, the relative

7 *Georgia v. Stanton*, 6 Wall. (U. S.) 50.

8 *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 734. See also *Georgia v. Stanton*, *supra*.

9 *Derby v. Athol*, 1 Ves. 201; *Bishop of Sodor and Man v. Derby*, 2 Ves. 337, 355.

10 *Penn v. Baltimore*, 1 Ves. 446; *Nabob of the Carnatic v. E. India Co.*, 1 Ves. Jr. 370.

11 *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 737.

12 *Id.* 719.

13 *New York v. Connecticut*, 4 Dall. (U. S.) *New Jersey v. New York*, 5 Pet.

(U. S.), 284; *U. S. v. Texas*, 143 621; *Virginia v. West Virginia*, 11 Wall. (U. S.)

89, 53; *Mississippi v. Louisiana*, 202 U. S. 1 See also 16 HARV. L. REV. 134.

14 *Rhode Island v. Massachusetts*, *supra*, 754.

situation of the parties, and the equality of the footing upon which they stand, in reference to the subject of the contract; and although the relationship of attorney and client may exist, yet if it has no existence *in hâc re*, the rule with regard to the *onus* of proof may no longer be applicable. Nor does the rule require the solicitor to point out the speculative possibility that a railway which is known to be in contemplation may improve the value of the property which he is buying from his client. *Edwards v. Meyrick*. 2 *Hare*, 60 : 12 *L. J. Ch.* 49 : 6 *Jur.* 924 : 62 *R. R.* 23 : 67 *Eng. Rep.* 25.

Trade mark—Property in Trade Name.

The ground on which the Court protects trade mark is, that it will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other *indiciae* by which he may pass off his own goods to purchasers as the manufacture of another person.

A man cannot acquire a property merely in a name or mark. *Perry v. Truefit*. 6 *Beav.* 66 ; 63 *R. R.* II : 49 *Eng. Rep.* 749.

REVIEWS.

The Workman's Breach of Contract Act : by Anandram Mewa Ram Jagatiani, Karachi, Price Rs. 2.

The Workman's Breach of Contract Act, as is well known to all lawyers and chief employers of labor, consists only of five sections, but it has given rise to a considerable body of rulings by different High Courts which throw a great deal of light on the provisions of the Act. All aids in the interpretation of the Act which is not free from defects of composition are welcome; and we find the author has taken no small pains in collecting the rulings passed up to date. Since decisions of the Chief Court, Punjab, are also included, which are omitted in most annotated editions, we recommend this book to the Bench and the Bar in this province specially. The price Rs. 2 seems to be a little excessive.

The Code of Civil Procedure (Act V of 1908) with Notes, Circulars &c., &c., by Lala Beni l'arshad, B. A., Pleader, Chief Court, Punjab, Lahore.

This highly useful edition of the new Code of Civil Procedure contains notes of rulings up to the end of 1908 with the report of the Select Committee on the Bill and Proceedings in Council.

The author has done well to incorporate in the volume Chief Court Circular No. VII-4431 G., dated 20th October 1908, which explains the more important changes introduced by the new Code, and in a comparative table shows the extent to which the new Code corresponds with, or differs from, the old Code of 1882, with remarks on important changes. The Index at the end seems to have been prepared with great labour. In congratulating the author we have no doubt his work will be appreciated by the judiciary and the profession.

We are informed that by correction slip No. 187, dated the 16th January 1909, the Chief Court has given it a recognition by adding the same to the list A. of approved books.

The Code of Civil Procedure, 1908, and a Digest of Punjab Cases, by M. L. Rallia Ram, Pleader, Chief Court, Punjab, Amritsar—Price, Cloth bound, Rs. 5.

A number of commentaries on the new Code of Civil Procedure have been presented to the legal world by enterprising lawyers since the passing of the Code, and it is difficult to pass judgment on their comparative worth. But the volume under review does not claim to be a commentary. It contains, besides the Code, a Digest of rulings passed by the Chief Court and published in the *Punjab Record* and the *Punjab Law Reporter*, from their commencement to the end of 1908. And since the inclusion in it of the rulings of the Chief Court, Punjab, is the special feature of this Digest, the practitioners and Courts in this province in search of decisions of the Chief Court will find their task rendered easy by referring to it. With the Act are also printed the Statement of Objects and Reasons, Report of the Select Committee and Proceedings of the Supreme Council. The following supplements will also be supplied by the author to the purchasers of the book.

SUPPLEMENT No. 1.

Will be out by the end of December, 1908, and will contain :—

A.—Note on the Code of Civil Procedure, 1908,—issued by the Punjab Chief Court. pp. 8.

B.—A Comparative Table, showing the extent to which Act V of 1908 corresponds with, or differs from, Act XIV of 1882, with remarks on important changes,—issued by the Punjab Chief Court. pp. 24.

C.—A Chronological Index of all cases reported in Rallia Ram's Code of Civil Procedure. Cols. 48.

D.—Addenda et Corrigenda printed on one side of the paper, bringing the rulings up to the end of 1908. pp. 24.

SUPPLEMENT No. 2.

Will consist of such of the Rules having the force of law which may be framed by the Punjab Chief Court under Part X of the new Code.

This will be issued as soon as the rules are published.

SUBSEQUENT SUPPLEMENTS.

Will be issued in July 1909 and January 1910, incorporating all recent rulings and rules, and will be supplied to customers on payment of postage only.

The Chief Court, Punjab, has ordered that this work be added to the list A. of approved books.

THE PUNJAB LAW REPORTER.

VOLUME IX.] 21ST & 28TH DECEMBER, 1908. [Nos. 39 & 40.

PUNISHMENT TO FIT THE CRIME.

The common expression that punishment ought to fit the crime is generally, or at least often, used with the idea that there should be such a correspondence between the punishment and the crime in point of severity as to satisfy one's sense of justice. People generally feel that a peculiarly dastardly and heinous crime deserves a punishment that will bring some sense of satisfaction or gratification to the outraged feelings of the public. They may not admit that it is a vindictive or revengeful feeling that is thus gratified, and perhaps it does not deserve to be so called; but at least there is something in the idea of poetic justice that gives the mind satisfaction. To seek this gratification in the practical administration of penal justice is, however, liable to result in punitive measures that are more impulsive than judicial in temper. But plain and practical commonsense does demand a far higher degree of fitness between public offences and their punishments than is now attained. It would be easy to make a long list of offences which are now punished in such an unbusiness like and unpractical way as to constitute almost no check whatever upon their perpetration.

Perhaps the most common and conspicuous instance of this sort just at present is that of the lawless and reckless use of automobiles. The hodge-podge of regulations in the various states and municipalities on this question is notorious. But among them all there is scarcely a jurisdiction in which any adequate protection to life and limb against the unlawful use of such vehicles is secured. As practical measures for public protection they are ridiculously inadequate. Men racing engines of tremendous power along the public streets and roads in flagrant defiance of the law because they want to catch a train or keep an appointment regard such an excuse as amply sufficient to excuse them from public blame; and the fine which they have to pay in the improbable event of being arrested they regard as a joke. When men who have spent the night, or a good part of it, in club, saloon, or other place of joviality, and who would resent any suggestion of intoxication, have fatal automobile accidents on their way home, the presumption is strong that they were not in the mental condition most conducive to safe driving. But every day, with almost unvarying regularity, the press reports furnish us with a list of fatal accidents many of which involve no presumption of this kind, but which show beyond doubt that the legal regulations of speed were utterly ignored. In short, there is not even a pretence of any

general obedience to the law on this subject. Another illustration of a different kind is that of the punishment for intoxication. Habitual offenders are regularly brought before the magistrate to receive punishment, but neither judge nor prisoner has the slightest idea that the punishment imposed will have any effect to prevent a repetition of the offence. In many cities disorderly houses are raided periodically, and fines collected, with the full understanding on both sides that the fines practically operate, not to prevent the offence, but to license it. It would be easy to lengthen this list indefinitely with instances in which the punishment does not, and is not expected to, prevent or materially restrain the commission of the prohibited offences, but either to license them, or at least to make them incidentally a source of revenue. If business men, in the conduct of their own affairs, showed as little sense in the adaptation of means to ends as our public authorities show in their ostensible purpose to prevent many of the lesser crimes and offences, their business would soon be in the hands of the bankruptcy court. One of the things sadly needed is an enlightened, businesslike grappling with the problem of preventing the many serious violations of law which at present the law is utterly inadequate to check. Punishment to fit the crime from the standpoint of an intelligent government must be a punishment that is best fitted to prevent the crime and protect the public. The law now, so far as it professes to aim at the suppression of offences, is in many cases an example of either insincerity or imbecility, because its effect is to license, rather than to prevent, what it prohibits.—*Case and Comment.*

INDIAN CASES.

(PRIVY COUNCIL DECISION).

Malicious prosecution, suit for, damages for—Principles applicable to the case—Prosecutor—Malice, the foundation of the action—When may malice be shown—Knowledge of the defendant as to the falsity of the charge—Liability in such a case.

In an action for damages for malicious prosecution, the person who can be made liable is the prosecutor.

The determination of the question as to who the real prosecutor is, depends upon all the circumstances of the case. The mere setting of the law in motion is not the criterion, nor is it enough to say that the prosecution was instituted and conducted by the police; the conduct of the complainant, before and after making the charge, his means of information and motives must also be taken into consideration.

The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry; a prosecution commenced *bona fide*, may become malicious in any of the stages through which it has to pass—*Narsinga Row v. Muthaya Pillai* (I. L. R., 26 Mad. 362)

explained and distinguished Fitz John v. Mackinder (9 C. B. N. S. 505), followed, *Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh VIII Cal. Law Journal*, page 337.

ENGLISH CASES.

(Taken from *Select English Cases*).

Horse—Warranty—Soundness—Cough.

A cough, at the time of the sale of a horse warranted sound, is an unsoundness and breach of the warranty, though it be afterwards cured without any permanent injury to the horse. *Coates v. Stephens*. 2 *Moody & Robinson*, 157 : 62 R. R. 785.

Horse—Warranty of "Free from Vice"—Crib-biting.

Crib-biting, which has not yet produced disease, or alteration of structure, is not an "unsoundness," but is a "vice," under a warranty that a horse is "sound" and "free from vice." *Scholefield v. Robb*. 2 *Moody & Robinson*, 210 : 62 R. R. 794.

MISCELLANY.

A JUSTIFIABLE DESIRE.—Judge Dowling— "Have you anything to say against the verdict?"

Prisoner (who has received life-sentence)—"Only that if I don't live to serve it out I wish you would put my attorney in to finish it."
—Judge.—*The Green Bag*.

DEATH DUTIES.—The race question on the Pacific slope is the mother of much curious litigation in which our Oriental laborers are involved. A Chinaman was fined under the California laws for removing the corpse of another Chinaman and shipping it back to China, and a Federal court seriously decided that the corpse of a Chinaman which was shipped out of the country was not an export within the meaning of the Federal Constitutional provision prohibiting the laying of imposts or duties by a state upon exports.—*The Green Bag*.

NATURAL.—Before he was sworn the presiding magistrate directed that the usual question be put to the negro : "Do you know the nature of an oath?"

The old darky shifted himself from one foot to the other before replying, a sly grin crept into his face. "Well, Jedge," said he, "I can't say how 'tis wid mos' folks ; but, yo' Honah, I reckon it's sorter secon' nature wid me."—*The Green Bag*.

THE MAN ON THE STAND.—Miss Lydia Conley, a Wyandotte girl, is the only Indian woman lawyer in the world. She is a member of the Kansas bar. She tells this story of a man she put on the stand to testify in his own behalf concerning land that was filched from him. The other side had a finely doctored case.

"He, as soon as he was sworn, turned to the justice and said: 'Squire, I brought this suit, and yet the evidence, excepting my own, is all against me. Now, I don't accuse any one of lying, Squire, but these witnesses are the most mistaken lot of fellows I ever saw. You know me, Squire. Two years ago you got me a horse for sound that was as blind as a bat. I made the deal and stuck to it, and this is the first time I have mentioned it. When you used to buy my grain, Squire, you stood on the scales when the empty wagon was weighed, but I never said a word. Now do you think I am the kind of a man to kick up a rumpus and sue a fellow unless he has done me a real wrong? Why, Squire, if you'll recall that sheep speculation you and me'—

"But at this point the squire, very red in the face, hastily decided the case in the plaintiff's favor."—*Rehoboth Sunday Herald*.—*The Green Bag*.

A SPELLING REFORM.—One of the witnesses in a lawsuit, who had just been sworn, was asked to give his name. He replied that it was Hinckley. Then the attorney for the prosecution requested him to give his name in full.

"Jeffrey Alias Hinckley."

"I am not asking you for your alias," said the lawyer, impatiently. "What is your real name?"

"Jeffrey Alias Hinckley."

"No trifling in this court, sir!" sternly spoke the judge. "Which is your right name—Jeffrey or Hinckley?"

"Both of 'em, your honour."

"Both of them? Which is your surname?"

"Hinckley."

"And Jeffrey is your given name?"

"Yes, your honor."

"Then what business have you with an alias?"

"I wish I knew, your honor," said the witness, ruefully. "It isn't my fault."

"What do you mean, sir?" demanded the judge, who was fast losing his temper.

"I mean, your honor, that Alias is my middle name, for some reason which my parents never explained to me. I suppose they saw it in print somewhere, and rather liked the looks of it. I'd get rid of it if I could do so without the newspapers finding it out and joshing me about it."

"The Court suggests that hereafter the witness begin his middle name with an E instead of an A. Counsel will proceed with the examination," said the judge, coughing behind his handkerchief.—*Youth's Companion*.—*The Green Bag*.

THE
PONJAB LAW REPORTER,
1908.
Volume IX.

Full Bench.

APPELLATE SIDE.

No. 1.

CIVIL.

*Before Mr. Justice Reid, Mr. Justice Johnstone, and Mr. Justice
Rattigan.*

RAGHU MAL,—(PLAINTIFF),—APPELLANT,
versus

BANDU,—(DEFENDANT),—RESPONDENT.

CASE No. 812 OF 1904.

*Estoppel—Execution of decree—Claim partly decreed—Appeal for
dismissed portion not barred by plaintiff seeking execution of the decree
passed in his favour.*

*Held, by the Full Bench, that a plaintiff who has obtained a decree for a
part of his claim and has appealed as regards the part dismissed is not debarred
from prosecuting the appeal because he has begun to execute the said decree.—82
P. R., 1868, overruled.*

*First appeal from the decree of H. Harcourt, Esquire, District Judge,
Delhi, dated 27th May 1904.*

Mr. Shadi Lal, Advocate, for Appellant.

Mr. Muhammad Shafi, Advocate, for Respondent.

ORDER OF REFERENCE TO A FULL BENCH.

RATTIGAN, J.—(7th Feby. 1906)—For respondent Mr. Shafi raises
a preliminary objection to the effect that as appellant has, since the filing
of the appeal, applied for and obtained execution of the decree in his
favour, the appeal by him in respect of that part of his claim which
was disallowed by the lower Court is barred. In support of this

contention reference is made to *Mahomed Khan v. Fida Mahomed* ⁽¹⁾ which has been cited without disapproval in at least two subsequent decisions of this Court (viz., *Muhammad Hussan v. Ghous Baksh* ⁽²⁾ and *Feroz-ud-din v. Ghulam Rasul*, Civil Appeal No. 695 of 1905).

Mr. Shadi Lal states that his client (the appellant) was compelled to apply for execution owing to the fact that another creditor had taken out execution against the same property, and that he was careful when applying for execution to state that he did so without prejudice to his right of appeal. The learned counsel also urges that *Mahomed Khan v. Fida Mahomed* ⁽¹⁾ was wrongly decided, and that the ruling therein is based on no provisions of law.

We are ourselves inclined to take this view. It seems to us, as at present advised, inequitable that a creditor who has obtained a decree for part of a money claim, and who has appealed against that part of the decree which disallowed the remainder of his claim, should be held to have lost his right of appeal simply and solely because he has executed the decree for what it was worth. We fail to understand the principle or justice of such a bar or estoppel. In such cases the appellant is appealing *not* for the part of the decree in his favour, but for the part that is either expressly or by implication adverse to him; and we are unable to understand why his appeal against the latter part of the decree should be held to be barred, because he has executed the former part. *Feroz-ud-din v. Ghulam Rasul* (Civil Appeal No. 695 of 1905) was concerned with a very different question, which was whether a vendee who in his appeal urged that a pre-emptor had no right of pre-emption was debarred from prosecuting his appeal by the fact that subsequently to its institution he had withdrawn from Court the amount deposited therein by the pre-emptor in accordance with the decree. In this case it was pointed out, with reference to *Muhammad Hussan v. Ghous Baksh* ⁽²⁾ "that the utmost benefit that the appellant could get from the analogy of the latter case would be some support to a contention that the withdrawal of the purchase-money could not prevent his prosecuting an appeal on the ground that the purchase-money was insufficient. That, however, is not the contention here. There is no mention of the amount in the grounds of appeal before us, nor was this point argued."

In *Muhammad Hussan v. Ghous Baksh* ⁽²⁾ the appellant had not applied for execution of his decree, and it was in this respect that *Mahomed Khan v. Fida Mahomed* ⁽¹⁾ was distinguished.

(1) 83 P. R., 1868,

(2) 49 P. R., 1880.

As we are not disposed to follow the ruling of the Division Bench in *Mahomed Khan v. Fida Mahomed* ⁽¹⁾, we refer the question involved to a Full Bench for determination.

The execution file should be sent for and be placed before the Full Bench at the hearing ; also the execution file relating to the claim of the decree-holder, Kanaya, against the same property. Respondent has undertaken to give details regarding the latter file.

Judgment of the Full Bench.

JOHNSTONE, J.—(15th June, 1906).—The question referred to this Full Bench was whether a plaintiff, who has obtained a decree for part of his claim and has appealed as regards the part dismissed, is debarred from prosecuting the appeal because he has begun to execute the said decree. The referring order of the Division Bench, dated 7th February, 1906, explains that the reference is a necessary one, because the view that Bench was disposed to take was in opposition to the ruling of a Division Bench of this Court in *Mahomed Khan and another v. Fida Mahomed* ⁽¹⁾.

After hearing Mr. Shafi, who supports the views held in 1868, we find in his arguments no reason for differing from the opinions set forth in the referring order. In our opinion the case *Feroz-ud-din v. Ghulam Rasul* (Civil Appeal No. 695 of 1905) relied on by him is clearly distinguishable, as the referring order shows ; and we repel the suggestion that if we agree in the correctness of that decision, it follows we must here hold prosecution of the appeal barred.

In short, we overrule the *dictum* in *Mahomed Khan and another v. Fida Mahomed* ⁽¹⁾ and answer the question stated above in the negative. The file will go back to the Divisional Bench, and the appeal will be heard.

APPELLATE SIDE.

No. 2.

CIVIL.

Before Mr. Justice Reid.

TOPAN DAS,—(OBJECTOR)—APPELLANT,

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND

TESA RAM,—(DEFENDANTS)—RESPONDENTS.

CASE No. 828 OF 1906.

(1) 82 P. R., 1868.

Land Acquisition Act (I of 1894), Section 31—Land acquisition—Compensation—Mortgage—Right of mortgagee.

The mortgagee of property, a portion of which is acquired by Government, is entitled to the whole of compensation allowed by Government, when the mortgage-money exceeds the sum awarded as compensation.

Appeal from the order of W. A. Harris, Esquire, Divisional Judge, Multan Division, dated 6th June 1906.

Lala Durga Das, Pleader, for Appellant.

Mr. Harris, Advocate, for Tesa Ram Respondent.

JUDGMENT.

REID, J.—(30th November, 1906).—This is an appeal from an order under the Land Acquisition Act, awarding to a mortgagee of the land acquired, a sum out of the compensation awarded proportionate to the area acquired as compared with the area mortgaged. Counsel are agreed that the mortgaged area is $66\frac{1}{2}$ bighas, and that the area acquired is approximately 6 bighas, and that the compensation awarded for the latter is Rs. 410-6-0. Counsel are not agreed as to the amount due under the mortgage, which is stated on the one side to be about Rs. 800, and on the other to be about Rs. 1,600.

In any case Rs. 410-6-0 for 6 bighas is out of all proportion to Rs. 1,600 for 66 bighas.

The authorities cited are (1) *Gosto Behary l'yne v. Shib Nath Dut, I. L. R., XX Cal., 241*, a case in which a *patni taluk* had been sold for arrears of revenue and the mortgagee thereof claimed surplus sale-proceeds. The Court said: "We think that the proper view to take of the matter is to regard the surplus sale-proceeds as the shape into which the mortgage security is converted, and, as before, such conversion the security could not be split up into parts, and the mortgagee was entitled to realise his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect."

The ruling was under Section 73 of the Transfer of Property Act, but the principle laid down appears to be applicable to the present case.

(2) Ghose on Mortgages, Edition III, page 332-3, in which authority is cited for the rule that, if the mortgaged property is converted into money under circumstances which prevent the mortgagee from following such property, the security will attach to the purchase-money. The author adds that as the security of the mortgagee is indivisible, the charge would fasten upon the whole proceeds and not on any particular part.

(3) *Basa Mal v. Tajammal Husain*, I. L. R., XVI All., 78, which is not in point, the mortgagee's claim having been dismissed on the ground that he had not applied the Land Acquisition Act.

(4) *Amugam v. Sivagnana*, I. L. R., XIII Mad., 321, in which it was held that the sale of land under the Act does not effect any destruction of the property so as to give the mortgagee a personal remedy against the mortgagor, the effect of the sale being to change the nature of the security and to substitute for the property mortgaged the compensation awarded.

The mortgage was effected on the 7th September 1886, the term being 16 years, so that it is *prima facie* redeemable at the present time and the appellants, assignees of the mortgagee, took steps under the Land Acquisition Act to assert their claim.

At, Ghose on Mortgages, Edition III, page 346, American authority is cited for the rule that where damages are awarded under the Land Acquisition Act for injury to mortgaged premises, the mortgagee will be entitled to the compensation money. "The sum awarded arises from " or grows out of the land, by reason of the injury which has diminished " its value. In equity it is the land itself."—*Bank of Auburn versus Roberts*, 44 N. Y., 192, *Jones*, S. 708. Section 82 of the Transfer of Property Act embodies the established rule, that where several properties are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage.

In re Stewart's Trusts, 22 L. J. (N. S.) Chancy and Bank, 369, it was held that when money has been paid into Court by reason of real estate having been taken under the compulsory powers of an Act of Parliament and remains in Court, it is to be considered as money or personal estate in the hands of the Court impressed with the trusts of the real estate.

In a case in which land was acquired at a date on which a considerable portion of the mortgage term had got to run and the profits are to be set-off against the interest on the mortgage-money, apparent hardship might be caused by holding that the whole compensation money should go to the mortgagee, but no such consideration arises in this case.

A mortgagee is entitled to take as much security as he can get for his money, and when part of the land mortgaged is taken from him his security is diminished *pro tanto*. In the present case the security has been diminished to the extent of Rs. 410-6-0, and the mortgagee is, in

my opinion, entitled to that amount in liquidation of the mortgage debt, the indivisibility of the mortgage attaching itself to the proceeds of the sale of part of the land mortgaged and the whole and each part of that land being security for the whole amount advanced.

For these reasons I modify the order of the Divisional Court by awarding Rs. 410-6-0 to the mortgagee, appellant. The respondents will pay the costs of this Court.

Appeal accepted.

APPELLATE SIDE.

No. 3.

CIVIL.

Before Mr. Justice Lal Chand.

FATTEH MUHAMMAD,—(PLAINTIFF)—APPELLANT,

versus

SAID AHMAD, AND OTHERS,—(DEFENDANTS)—RESPONDENTS.

CASE NO. 160 OF 1905.

Limitation Act (XV of 1877), Section 22—Limitation—Addition of defendant after expiry of limitation period.

Section 22 of the Limitation Act does not apply when the original suit is continued against the added defendant, who derives his title from the original defendant by an assignment pending the suit.

A pre-emptor's suit cannot be dismissed as barred by limitation by the operation of Section 22 of the Limitation Act, when the vendee transfers the property in dispute after the institution of the suit for pre-emption, and the transferee's name is added as a co-defendant at a time when the original claim would be barred by limitation.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 17th October, 1904.

Mr. Gurcharan Singh, Advocate, for Appellant.

Mr. Fazal Husain, Advocate, for Respondents.

JUDGMENT.

LAL CHAND, J.—(20th July, 1906).—The lower Courts have dismissed the suit as barred by limitation, relying on *Nabi Baksh v. Fakir Muhammad* (1). It is contended for appellant that the case is distinguishable on the ground that in the present case the re-sale was effected after the suit was instituted and *Suput Singh v. Imrat Tewari* (2); *Chuni Lal v. Abdul Ali Khan* (3); *Mussammatal Shakro v. Molar Mall* (4); *Harnam Singh v. Jiwan* (5), and Section 372, Civil Procedure Code, are relied upon to show that the claim is not barred. It appears to me that the ground taken is valid. Section 22, Limitation Act, does not seem to be applicable when the original suit is continued against the added defendant, who derives his title from the original defendant by an assignment

(1) 25 P. R., 1903; s. c., 74 P. L. R., 1903. (2) I. L. R., V. Cal., 720.

(3) I. L. R., XXIII All., 831.

(4) 68 P. R., 1879.

(5) 7 P. R., 1906; s. c., 56 P. L. R., 1906.

pending the suit. The first Court's order, dated the 15th April, 1904, shows that Madat Ali was added as a defendant, because it was considered necessary to make him a party, and although Section 372, Civil Procedure Code, was not quoted in the order itself, or in the application filed by plaintiff, yet that section is clearly applicable to the facts of the case, and the order adding Madat Ali as a defendant may properly be held to imply that leave of Court was given as required by Section 372. When plaintiff instituted his claim for pre-emption, Madat Ali had no interest in the property sued for, and could not possibly have been made a party to the suit. It seems not only unjust but anomalous that the suit should be held barred, because the original defendant has chosen to re-sell the property to another person after the suit was instituted. In this case it seems doubtful whether the re-sale was effected after the prescribed limitation had expired, but if the view contended for by the respondent be correct, then a suit may be thrown out as barred by reason of a re-sale effected pending the suit even after the stipulated period had expired. No claim for pre-emption could under the circumstances possibly succeed. Section 22, therefore, does not seem to me to be applicable where the added defendant derives his title from the original defendant by an assignment pending the suit. The words used in Section 22 are "when a new plaintiff or defendant is substituted or added after the institution of the suit." This obviously means a plaintiff or defendant who claims in his own right, and in that sense is a new plaintiff or defendant. It is intelligible so far as such new plaintiff or defendant is concerned that the suit should be held instituted when he was made a party.

But when the interest set up by the added party is only derivative acquired pending the suit, then, properly speaking, he is not a new defendant or plaintiff, and the case is one merely of continuation of the original suit with leave of Court, under Section 372, Civil Procedure Code, without any change in the date of its institution. This view is further supported by Section 332, Civil Procedure Code, which apparently treats the transfer after the institution of the suit as holding under the judgment-debtor and as such liable to ejectment. In spite of the re-sale plaintiff could obtain a decree and then recover possession in execution. *A fortiori* his claim could not be dismissed as barred by limitation by reason of re-sale in favour of Madat Ali, because he was added as a defendant after the expiry of the stipulated period. The counsel for respondent relied upon *Harak Chund v. Deonath Sahay* ⁽¹⁾, but that case is

(1). *I. L. R. XXV Cal.*, 469.

clearly distinguishable on the ground that leave of Court was not obtained to carry on the suit in the name of the substituted plaintiffs. I, therefore, hold that the suit is not barred by limitation by reason of Madat Ali (who acquired his title from the first vendee after the institution of plaintiff's suit) having been joined as a co-defendant after the expiry of the stipulated period.

I accept the appeal and, setting aside the decrees of the lower Courts, remand the case to the first Court for a decision on the merits. This order will not debar Madat Ali from setting up in defence, if he so desires, his own equal or superior right of pre-emption, as the case may be.

Court-fee on appeal in this Court and the lower Appellate Court will be refunded and other costs will be costs in the case.

Appeal accepted.

APPELLATE SIDE.

No 4.

CIVIL.

Before Mr. Justice Johnstone.

AMIR ALI,—(PLAINTIFF)—APPELLANT,
versus

Mussammat BAGGO, AND OTHERS,—(DEFENDANTS)—RESPONDENTS.

CASE No. 829 of 1904.

Custom—Succession—Will—Daughter—Widow—Awans of Rawalpindi District—Burden of proof.

Held, that according to custom among *Awans* of Rawalpindi district, a childless male proprietor may alienate his ancestral property by will or gift in favor of his daughter, and his brother cannot take exception to it. Wills and gifts stand on the same footing. Case law on customs among *Awans* generally discussed.

Further appeal from the decrees of Captain B. O. Roe, Divisional Judge, Rawalpindi Division, dated the 26th May, 1904, reversing that of Lala Makhan Lal, Subordinate Judge, first class, Rawalpindi, dated the 9th December, 1903, decreeing plaintiff's claim.

Mr. Harris, Advocate, for Appellant.

Mr. Morrison, Advocate, for Respondents.

JUDGMENT.

JOHNSTONE, J. (26th November, 1906)—In this case plaintiff's suit impugns a will made by his late brother, Jafar, in favour of his widow and his two daughters as being (a) a fabrication; (b) executed by Jafar when he was out of his senses; (c) invalid by custom. The Courts below have both found against plaintiff as to (a) and (b), and he does not attack these findings in his appeal. As regards (c) the first Court decided

against the will and gave plaintiff a decree, which the Divisional Judge has reversed on the ground that custom is in favour of such wills. Plaintiff appeals on this matter alone, and I have heard arguments and have also studied most of the available information regarding the *Awan* tribe to which the parties belong.

In Wilson's Gazetteer of Shahpur (1897) the *Awans* are described as an indigenous Punjabi tribe, though they claim descent from one Alif Shah *alias* Qutab Shah, a descendant of Ali. There are over 52,000 of them in Shahpur in the Khushab *Tahsil*, and they own all but one of the Salt Range villages and $\frac{4}{5}$ -th of the land of the Khushab (Salt Range) Settlement Circle. In what was until lately the Rawalpindi District, but is now the two districts of Rawalpindi and Attock, there were in 1893-1894 some 1,30,000 of these *Awans*,—see Revised Gazetteer, p. 101. In the Talagang *Tahsil*, now a sub-division of Rawalpindi, but a short time ago, a part of Jhelum, the *Awans* are the prevailing tribe, and the tract is known by the people as Awan Kari.

The writer of the Jhelum Gazetteer (1883-84) also classes them as a Punjabi peasant tribe, and discards all the theories of foreign origin that have been put forward from time to time. These *Awans*, I should note here, are also found in Peshawar, Sialkot, Bannu, Gujrat, Ludhiana, Jullundur and Mianwali. We are, therefore, I think, justified in taking as our *initial* presumption that they would follow customs similar to those of the *Jat* tribes of this Province.

The parties to the present case are inhabitants of the Rawalpindi *Tahsil*. The main provisions of the will to which exception is taken by the plaintiff are these :—

- (1) $\frac{1}{4}$ th, estate to go to widow; $\frac{1}{4}$ th to each daughter; $\frac{1}{4}$ th to collaterals.
- (2) After death of widow, her $\frac{1}{4}$ th to go to collaterals.
- (3) Daughters (two) to be full proprietors even after they marry, and to be succeeded by their husbands and sons.
- (4) If daughter dies unmarried, her share to go to collaterals.

Here I should note in passing that I overrule the suggestion made by Mr. Morrison, Advocate, for respondents, that the suit should not have been for a mere declaration. The widow being alive, how could plaintiff get possession at once even if he succeeded in overthrowing the will?

The dispute is clearly, really, between plaintiff, a brother, and the two daughters: Plaintiff can hardly have a case against the widow who under the will is made little more than a life-owner. Or, if this is not

clear, plaintiff is, as regards the widow, entitled merely to a declaration that what she holds, she holds as a life-owner only.

Turning to the daughters, there can be no doubt that among Punjabi agriculturists the presumption is that as heir to the ancestral property of a sonless proprietor a brother is preferred to a daughter, except perhaps where the daughter is married to a *khanadamad* or has rendered special services to her father. Neither of these two incidents emerge here. The presumption also is that gift or will of ancestral property to a daughter without the consent of the brother is invalid. For these general propositions no authority is required, but I may quote Section 23, "Rattigan's Digest of Customary Law," 6th Edition.

But the *Awans*, notwithstanding their supposed origin, have undoubtedly here and there departed from the rules of custom here stated, if they ever followed them, though the evidence to be found in compilations of customs and in Chief Court rulings is conflicting.

In the Rawalpindi Code of Customary Law (Robertson), we find the following indications of the position of daughters amongst *Awans*, and of the powers of a sonless proprietor to give or bequeath ancestral estate, viz:—

- (a) p. 10, QN. 13: among *Awans* collaterals up to 4th degree exclude daughters.
- (b) p. 10, QN. 14: even if daughter lived with her father till his death, near male collaterals are preferred.
- (c) p. 16, QN. 37: established that a man can will away some part of his property, though bequest of whole estate to the detriment of near collaterals would be disputed.
- (d) p. 17, QN. 38: *Awans* say testamentary disposition can be made without consent of heirs, but this is more than doubted by the author.
- (e) p. 18, QN. 40: an *Awan* proprietor, having no male issue, can make a gift of whole or part of his estate without the consent of near agnates: instances are given. But—
- (f) p. 19, QN. 42: *Awans* admit a difference in power of gift according as property is ancestral or acquired.
- (g) p. 21, QN. 48: a father cannot disinherit one son for the benefit of the rest.
- (h) p. 22, QN. 54: the custom is for a father to divide equally between his sons, but he can divide unequally if he chooses;

many instances of unequal division in adjoining tribes, not among *Awans* :—

In the last three pages of "Roe and Rattigan's Tribal Law" (1895) an abstract is given of the unpublished Shahpur *Riwaj-i-am*. It is there stated—p. 149—that if among *Awans* there are male descendants in male line, immovable property cannot be gifted without their consent, but in default of them it may be gifted to any heir (*waris*) or to daughters or sisters, or their sons, or to a son-in-law, while an unequal distribution amongst sons cannot be made.

I have given this information from Robertson's Code and from Roe and Rattigan's book, in order to show what guidance the Courts have had in recent years from what might be called text-books or statements of opinions of expert officers. It remains to see (i) the net result of the Chief Court rulings regarding *Awans*; (ii) special proof of custom offered in this case itself. I have said that the *initial* presumption, before we look at statements of custom and Chief Court rulings and the special evidence on the present record, is against the will and against the succession of daughters in preference to brothers. It is, therefore, for defendants to show that this presumption is rebutted by statements of custom aforesaid and by Chief Court rulings relating to the tribe. If they are successful in this, it would then become incumbent on plaintiff to show that *the present record* proves a custom in his favour. I had better clear the ground by taking up the latter question first.

Only three instances have been put forward in the first Court by defendants and none by plaintiff. Of these three instances, one, Malli's case, is clear and is in favour of defendants, the other two are denied and are not proved. Malli's case was fought out in Court and ended in a decision in favour of a will to a daughter to the detriment of a collateral. But a single instance can hardly rebut a presumption worthy of being called a presumption; and so we see that the present record will hardly help us at all.

As regards Chief Court rulings bearing on this dispute, I have found a very large number, out of which I have selected 30 as showing varieties of view and opinion. These I proceed to classify. One ruling appears twice.

(A) Daughters *v.* collaterals as heirs :—

- (1) 81 *P. R.*, 1879 (Khushab); unmarried daughters preferred to collaterals.

- (2) 64 *P. R.*, 1892 (Ludhiana) : agnates in 10th degree preferred to daughter's son.
 - (3) 115 *P. R.*, 1892 (Rawalpindi town) : *onus* generally against daughter and daughter's son and in favour of brother and nephew. [In this ruling no previous cases were noticed, the parties being treated as if they were *Jats*. This ruling appears again lower down under B.]
 - (4) 31 *P. R.*, 1893 (Peshawar) : in presence of collaterals, daughter only gets maintenance.
- (B.) *Gifts to daughters and their sons and husbands in presence of sons and agnates :—*
- (5) 23 *P. R.*, 1877 (Sialkot) : notwithstanding *Rivaj-i-am* to the contrary gift to daughter by sonless proprietor held valid.
 - (6) 39 *P. R.*, 1887 (Gujrat) : gift to resident daughter valid, not to non resident daughter.
 - (7) 36 *P. R.*, 1891 (Khushab) : decided finally on the ground of non-delivery of possession : contest between a mother, widow and agnates on the one hand and sister's son on the other, who was donee : no opinion in favour of or against gift.
 - (8) 115 *P. R.*, 1892 (Rawalpindi town) : see (3) above ; gift to daughter and her son invalid in absence of evidence of special custom.
 - (9) 81 *P. R.*, 1894 (Talagang) : presumption against gifts of half ancestral estate to daughter in presence of sons.
 - (10) 93 *P. R.*, 1894 (Sialkot) : gift upheld of half ancestral land to resident son-in-law who has not inherited from his own father.
 - (11) 126 *P. R.*, 1894 (Sialkot) : gift to resident son-in-law assumed valid ; but question of succession to donee by his collaterals decided in the negative.
 - (12) 15 *P. R.*, 1895 (Talagang) : gift to daughter's son in presence of nephew ; not decided on question of power to gift ; opinion rather in favour of validity if possession had only followed.
 - (13) 9 *P. R.*, 1899 (Khushab) : in favour of unrestricted power of sonless proprietor to gift property, ancestral or otherwise, to daughter, daughter's son, son-in-law, or agnate.
 - (14) 53 *P. R.*, 1899 (Mianwali) : childless man has unrestricted powers of gift or will.

(15) 14 P. R., 1903 ⁽¹⁾(Jullundur) : gift to daughter or daughter's son by sonless man valid against agnates in 3rd degree.

(16) 8 P. R., 1906 ⁽²⁾(Talagang) : a large number of rulings collected ; gift to daughter's son who had rendered service to the sonless donor valid against nephews.

(C.) *Unequal distribution among descendants* :—

(17) 8 P. R., 1879 (Shahpur) : gift to son by one wife upset by son of another wife.

(18) 7 P. R., 1891 (Jhelum) : father's power of unequal distribution denied.

(19) 107 P. R., 1894 (Rawalpindi) : same.

(20) 13 P. R., 1902 ⁽³⁾(Khushab) : unequal distribution of ancestral estate so as to disinherit a son disallowed.

(D.) *Gifts to other than daughters and their sons and husbands* :—

(21) 176 P. R., 1888 (Peshawar) : a certain power of gift asserted ; no precise rule : see also 9 P. R., 1899; and 53 P. R., 1899, at (13) and (14) above.

(22) 52 P. R., 1892 (Rawalpindi) : *onus* as in *Jat* cases : no power to give whole estate to grand-nephews in presence of brothers.

(23) 79 P. R., 1896 (Khushab) : gift to wife's brother, a distant agnate, valid against half-brothers.

(24) 49 P. R., 1898 (Khushab) : gift to first cousin (uterine brother) upheld : several rulings in favour of gifts mentioned.

(25) 46 P. R., 1900 ⁽⁴⁾(Talagang) : gift by a sonless man to wife's sister's son valid in presence of brother.

(E.) *Wills* :—

(26) 121 P. R., 1886 (Bannu) : a sonless man has no special power to will property.

(27) 171 P. R., 1889 (Jullundur) : no custom proved under which a widow can bequeath whole estate to unmarried daughter.

(28) 108 P. R., 1893 (Jhelum) : will to a daughter in presence of brother invalid.

(29) 88 P. R., 1895 (Talagang) : bequest to an agnate one degree further removed than plaintiff held invalid in absence of proof of special custom.

(30) 22 P. R., 1899 (Talagang) : power to will away ancestral estate denied.

(31) 26 P. R., 1901 ⁽⁵⁾(Shahpur) : power to will exists, and bequest to daughter's son in presence of brother is valid.

(1) s. c., 41 P. L. R., 1903.

(2) s. c., 64 P. L. R., 1906.

(3) s. c., 161 P. L. R., 1901.

(4) s. c., P. L. R., 1900 p. 404.

(5) s. c., 65 P. L. R., 1901.

There are also a few rulings relating to alienation of self-acquired property which are of little use here.

These then are the rulings, and it has to be borne in mind that under the authority of 48 *P. R.*, 1903 ⁽¹⁾ there is little or no difference between the power to gift and the power to will. This was not always the doctrine followed or believed to be sound, for it used to be supposed that a power of gift *inter vivos* might be more readily conceded than a power to devise by testament.

I have set forth class A, because it is important to see to what extent custom favours daughters apart from gifts or bequests. I have set forth class B, because gifts and wills have been declared to be on much the same footing. C and D are classes of cases from which it is possible to gather what is the custom in regard to alienations from another standpoint, namely, the standpoint of the powers of male proprietors to deal with their own at will. The present case is one of a will, and thus the object in setting down the six cases in class E is apparent.

In class A only one case is in favour of daughters, and that is not only the earliest but it is of a date prior to the emergence of that agnatic theory set forth in 107 *P. R.*, 1887, (*F. B.*) and many subsequent rulings. The net result is distinctly unfavourable to daughters. The four cases in class C show the existence of a peculiarly jealous resistance against all attempts at differential treatment of male heirs apart from questions of competition between male heirs and persons outside the agnatic group. Class C also does not help defendants much. No. 31 is a fairly strong case for wills from Shahpur and No. 27 can be left out of account, but the other three cases (two from Talagang and one from Bannu) are dead against all power of alienation of ancestral estate by testament. So far the balance is undoubtedly against the defendants in the present case. It is when we come to classes B and D, gifts of all kinds, that we find evidence in favour of defendants.

I think if these classes are fairly looked at, it will be seen (i) that any interference with the natural rights of sons is jealously resented; (ii) that, when there are no sons, much freedom is allowed to male proprietors; (iii) that, while especial indulgence is shown in approving gifts in return for services rendered or to resident daughters or son-in-law, there is a sufficient residuum of authority for the proposition that in the case of a sonless man a gift to a daughter or daughter's son would be held valid in the absence of rebuttal. As to (i), I would

(1) s. c., 111 *P. L. R.*, 1903.

refer to case (9) and to the comparative absence of attempts to pass over sons. As regards (ii), I point to Nos. (5), (12), (18), (14), (15), (23), (24), (25). Of these Nos. (13), (14) and (25) from Khushab, Mianwali and Talagang, are specially strong. As regards (iii), I rely upon these same cases, Nos. (5), (12), (13), (14) and (15), and refer also to Nos. (6), (10), (11), (16). Against all this we have really only Nos. (8) and (22), the latter of which can be in part explained away by observing that it was a case of contest between heirs equally entitled. The statements of custom noted early in this judgment, on the whole, tell a similar tale.

I would find, then, in favour of the will in the present case. I adopt the idea set forth in 48 P. R., 1903⁽¹⁾ (F. B.) and put gifts and wills on the same footing. The decisions against the power to will in some cases proceeded upon the idea that while the rule of alienation by gift was a rule of custom, that of alienation by will was a matter of Muhammadan law.

It follows that I must dismiss the appeal with costs.

Appeal dismissed

APPELLATE SIDE.

No. 5.

CIVIL.

Before Mr. Justice Lal Chand.

SUNDAR LAL, AND OTHERS,—(PLAINTIFFS)—APPELLANTS,

versus

RAM SINGH,—(DEFENDANT)—RESPONDENT.

CASE No. 158 OF 1905.

Punjab Alienation of Land Act (XIII of 1900). Retrospective effect of—Vendor and purchaser—Sale—Time for delivery of possession.

The provisions of the Punjab Alienation of Land Act do not apply to transactions completed before the Act came into force, and a suit for possession of land is not barred by the Act when right to claim possession had accrued before the Act came into force.

When the sale-deed does not fix any time for delivering possession by the vendor to the vendee, in the absence of any special agreement, it may fairly be presumed that it was intended to deliver possession within reasonable time.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 15th July 1904.

Mr. Duni Chand, Advocate, for Appellants.

Lala Durga Das, Pleader, for Respondent.

(1) s. c., 111 P. L. R., 1908. (F. B.)

JUDGMENT.

LAL CHAND, J.—(20th June 1906.)—The facts of this case are given in full in the judgment of the lower Appellate Court. The only question in appeal is whether the lower Appellate Court has rightly dismissed plaintiffs' suit on the ground that the claim for sale of land by defendant to plaintiffs is contrary to the provisions of the Punjab Land Alienation Act and, therefore, not maintainable. I am unable to agree with the view taken by the lower Appellate Court. It is found correctly that the sale transaction was completed on 31st May 1899, *i.e.*, more than two years prior to the passing of the Land Alienation Act. But the lower Appellate Court has held the Act applicable because "the making of the deficiency was to be completed in case of certain contingencies occurring, and it is only now the plaintiffs have acquired a right to claim the land promised to them."

There is nothing on the record to support the view that the contingencies requiring the deficiency to be made up occurred after the passing of the Land Alienation Act. The sale-deed and the contemporaneous registered agreement did not fix any time for delivering possession by the vendor to the vendee, and, in the absence of any special stipulation as to time entered in the agreement it would be fair to presume that it was intended to deliver possession within reasonable time. I cannot hold that two years would at all be a reasonable period for fulfilling the agreement. The right to claim the land in dispute had, therefore, accrued to the plaintiffs before the Land Alienation Act came into force, and the subsequent passing of the Act could not deprive plaintiffs of their vested rights under the sale-deed which is found to have been completed on 31st May 1899. Similar view was taken of sales by foreclosure in *Ram Nath v. Kerori Mall* (38 P. R., 1904,⁽¹⁾) and *Nathu Lal v. Jafar* (20 P. R., 1905⁽²⁾); and it appears to me to be the correct view. Moreover, I am inclined to hold that the purchase of the area sued for was completed on 31st May 1899, when the deeds were executed and registered and that the present claim is not for specific performance of an agreement, but to enforce a sale already complete. This view is supported by the fact that 78 *bighas* were actually sold, and what was agreed upon was to make up the deficiency in the manner agreed upon in case possession was not delivered of the whole area alienated by sale. There is, therefore, no reason for holding that the suit really involves sale by defendant to plaintiff of land sued for.

(1) S. C., 142 P. L. R., 1904. (2) S. C., 27 P. L. R., 1905.

For these reasons I accept the appeal, set aside the order of dismissal, and return the case to the lower Appellate Court for deciding the defendant's appeal. Stamp fee will be refunded, and other costs will be costs in the case.

Appeal accepted.

REVISION SIDE.

No. 6.

CIVIL.

Before Mr. Justice Chatterji, C. I. E.

GANDU SINGH,—(PLAINTIFF),—PETITIONER,
versus

NATHA SINGH, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 139 OF 1906.

Punjab Courts Act (XVIII of 1884) as amended, Section 70 (1), (b)—Punjab Tenancy Act (XVI of 1887), Section 4 (1)—Revision—Civil cases—Land suit—Suit for possession of unculturable land outside abadi—Question as to jurisdiction—Power of Chief Court to revise findings of fact relating to question of jurisdiction.

Held, that the Chief Court is competent in the exercise of its revisional powers in determining questions of jurisdiction of lower Courts to consider findings of fact arrived at by the lower appellate Court.

Held, that a suit for possession of unculturable land outside the *abadi* of a village attached to a well and used for stacking *bhusa* and *khurli* is a "land suit."
Petition for revision of the order of Lala Kesho Das, District Judge, Amritsar, dated 18th October, 1905.

Pandit Sheo Narain, Pleader, for Petitioners.

Mr. Gurcharn Singh, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J. (15th June, 1906.)—The only point for consideration by me is whether the District Judge had jurisdiction to hear the appeal, or, in other words, whether the suit is a land suit or an unclassified one.

Mr. Gurcharn Singh objects that I have no power to question the finding of the District Judge, that the land is not land as defined in section 4, clause 1, of the Punjab Tenancy Act, 1887, but I am of opinion that I have that power, and must have it in order to be able to exercise my revisional functions. I have to decide whether the District Judge had jurisdiction, and, in order to do this, I must have power to go into all the matters pertaining to the conditions of cognizance by the lower Court of the appeal decided by it. This seems to be a self evi-

dent proposition, *vide* remarks in *Roebuck v. Henderson*, 54 P. R., 1896, at page 158. I, therefore, overrule the objection.

Coming now to the merits of the question, I am of opinion, after a due consideration of the authorities and the definition given in the Tenancy Act, that the land is land within the meaning of section 4, clause 1 of that Act. The definition is not very clear on all points, but I find that the land is outside the *abadi* and is attached to a well. It has a *khasra* number which shows that it was measured at Settlement, and it is proved that it is duly entered in the *jamabandi* in 1892-93. Defendants, Mangal, etc., are entered in the cultivators' column. It appears in the *jamabandi* of 1903 and 1904 as land of their ownership, and mutation of names took place in their favour on 15th June, 1904; it has all along been shown in the Revenue Records. It has *khurlis* and is entered as *ghair-mumkin*, and *bhusa* is stacked on it. These facts are sufficient to show, I think, that the land is agricultural land and is used for purposes subservient to agriculture, and fulfils the requirements of section 4, clause 1, of the Tenancy Act. The suit is thus a land suit, and the District Judge was not competent to hear the appeal.

Objection to the jurisdiction of the District Judge was taken before him, but overruled; I am bound therefore to interfere.

I accept the application and set aside the decree of the District Judge, and order the memorandum of appeal to be returned to the defendant for presentation in the proper Court.

Court-fee on the petition for revision to be refunded. Costs to abide the event.

Petition accepted.

APPELLATE SIDE.

No. 7.

CIVIL.

Before Mr. Justice Reid.

KARIM BAKHSH, AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,
versus

WATTA MAL, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 278 OF 1906.

Custom—Pre-emption—Shops—Katra Patrangan of Amritsar city.

Held, that the plaintiff had failed to prove that a custom of pre-emption in respect of sales of shops existed in *Katra Patrangan* of Amritsar city.

Further appeal from the decree of A.E. Hurry, Esquire, Divisional Judge Amritsar Division, dated 4th November, 1905.

Mr. Fazal Hussain, Advocate, for Appellants.

Rai Sahib Lala Sukh Dial and Lala Rup Lal, Pleaders, for Respondents.

JUDGMENT.

REID, J. (9th November, 1906).—The first question for decision is whether the right of pre-emption in respect of shops exists in *Katra Patrangan*.

The evidence on the record satisfies me, and it is practically conceded that *Katra Patrangan* forms part of *Kila Bhangian* and is not a separate division of the city of Amritsar. The burden of proving the existence of the right was on the plaintiff-appellants. As remarked by the lower Appellate Court, *Kila Bhangian* is a very large sub-division and the right set up must be proved to exist in it, the number and value of instances cited being considered with reference to the whole sub-division and not with reference to any particular part thereof, evidence of 2 or 3 instances in one small *Katra* or street does not establish the existence of the right in that *Katra* or street, as distinguished from a *Katra* or street of the same sub-division in which no instances have occurred, all being part of the same sub-division and not separate sub-division. The whole sub-division is the unit, the existence of the right in which has to be established. Apart from oral evidence, which is of very little value, counsel for the appellant relied on:—

(1) *Labhu Singh v. Gurditta*,⁽¹⁾ in which a Division Bench in a suit for pre-emption in respect of a shop, said: "The first question which arises in this case is whether *Katra Kanak Mandi* in the city of Amritsar forms part of *Katra Bhangian*, in which the custom of pre-emption admittedly prevails." The language used is loose, and I am unable to accept this statement as a finding, or as recording an admission of the existence of the right in respect of shops as distinguished from houses. The plaintiff might well have sought to base an argument in favour of the existence in respect of shops on an admission of the existence in respect of houses. The Court held that the shop was situate in another sub-division and dismissed the suit. The issues in the Courts below and the memorandum of appeal to this Court did not distinguish between the right in respect of houses and the right in respect of shops.

(2) *Attar Singh v. Sant Singh*,⁽²⁾ in which a Division Bench held, on the authority of a ruling of this Court in 1888 and a compromise decree of the Additional District Judge of Amritsar in 1896, that the right existed in respect of shops in *Katra Nihal Singh*, another sub-division

(1) 46 P. R., 1882. (2) 113 P. R., 1906; s. c., 9 P. J. R., 1907.

of the city of Amritsar. The Bench also found that the vendor had himself purchased the shop property in suit by a threat of pre-emption.

(3) Civil Appeal No. 39 of 1905, in which a Division Bench held that the existence of pre-emption in respect of houses in *Kila Bhangian* had been established. The Court dealt with three instances of claims, two being in respect of houses and one in respect of a shop, and found that the former had been successful and the latter unsuccessful.

(4) Amritsar Divisional Court, Civil Appeal No. 339 of 1904, dismissing a suit for pre-emption in respect of a shop in *Katra Talab Tunda*, a separate sub-division of the Amritsar city. The Court found that *Talab Tunda* was not part of *Kila Bhangian*, and that instances from other sub-division could not supply the absence of instances in the sub-division in suit. These findings cannot be treated as authority for the existence of the right in respect of shops in *Kila Bhangian*.

(5) *Mamon v. Ghaunsa*,⁽³⁾ in which a suit for pre-emption in respect of a house in another sub-division of the city of Amritsar was decreed, and the Division Bench held that the existence of the right in neighbouring sub-divisions might be taken into account in support of the direct "evidence of the existence of the custom in the particular sub-division concerned."

(6) Two decisions by subordinate Courts of Amritsar in 1895 and 1904, in the first of which the parties admitted the existence of the right in respect of a shop in *Katra Patrangan*, and a compromise was effected. In the second case there was a compromise and the decree was based thereon.

For the respondents the following authorities were cited:—

(1) Civil Appeal No. 175 of 1898, in which a Division Bench of this Court held that the plaintiff pre-emptor had failed to prove either that *Lohi Mandi* was part of "*Katra Bhangian*" or that, even if it were part, any custom of pre-emption in respect of shops existed therein.

(2) Civil Appeal No. 1271 of 1900, in which a Division Bench held that the plaintiff-pre-emptor had failed to prove the existence of the right in respect of shops, as distinguished from houses, in *Katra Ahluwalian*, a sub-division of Amritsar.

(3) Civil Revision No. 793 of 1906, in which I concurred with the two Courts below in holding that the plaintiff-pre-emptor had failed to prove the existence of the right in respect of shops in *Kila Bhangian*. A marked distinction between the right of pre-emption in respect of shops and in respect of houses exists, and the plaintiff-pre-emptor has, in my

(3) 99 P. R., 1906; s.c., 130 P. L. R., 1906.

opinion, failed to establish the existence of the right in respect of shops in *Kila Bhangian*, the weight of authority, indeed being against him.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 8.

CIVIL.

Before Mr. Justice Chatterji, C. I. E.

ANWAR ALI,—(JUDGMENT-DEBTOR),—APPELLANT,

versus

INAYAT ALI, AND OTHERS,—(DECREE-HOLDERS)—RESPONDENTS.

CASE No. 943 OF 1905.

Civil Procedure Code (Act XIV of 1882), Section 230—Limitation Act (XV of 1877), Schedule II, Article 179, Clause 2—Execution of decree—Joint decree—Appeal against some of the judgment-debtors in respect of the dismissed portion of claim—Starting of limitation period against other judgment-debtors.

In a suit for possession by partition a decree was passed by which plaintiffs were awarded about a fourth share in property No. 1 against defendants Nos. 1, 2, 3 and 7, and a certain share in property No. 2 against defendants Nos. 1, 2, 3, 4 and 5. The decree against defendant No. 4 was *ex parte*. When the present application of execution was made it was contended by defendant No. 4 that, so far as he was concerned, the execution was barred under Section 230 of the Civil Procedure Code and Article 179 of the second schedule of the Limitation Act, the limitation running against him from the date of the passing of the decree.

For the decree-holder it was contended that as the decree was disputed by the other defendants and final decree in the case was not passed by the Chief Court more than three years previous to the application for execution, the execution was not barred, as limitation ran in case of an appeal against a decree from the date of the final decree of the Appellate Court.

Held, that the execution was not barred, for there was a single decree passed in favour of the plaintiff and not two, though all the defendants were not interested in both the properties in respect of which the decree was passed. A decree as was passed in this case being in the nature of a joint decree could not be split into two portions, and an appeal having been filed against the decree, the date of the final decree gave the starting point of limitation.

Further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 14th November 1904.

Mr. Oertel, Advocate, for Appellant.

Lala Sangam Lal, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J.—(23rd June, 1906).—This is a very old case and there have been numerous proceedings taken in it and various orders and decrees passed, which tend to obscure the understanding of the proper issue involved in the present appeal. It is difficult within a short compass and indeed unnecessary to give a complete *resume* of all of them. I shall, therefore, briefly refer only to such facts as have a bearing on the point raised before me and afford help in properly disposing of it. The present plaintiffs decree-holders respondents brought a suit for possession by partition of two houses in Lahore, called Nos. 1 and 2 in the proceedings, against nine persons, whose names need not be given here, on 21st July, 1887, in the District Court of Lahore. Anwar Ali, the present appellant, was defendant No. 4. The pleadings of the parties and the findings of the District Judge are unimportant, for the decision of this case, and it is sufficient to state that his final and amended decree was passed on 17th January 1899, by which he awarded plaintiffs a decree for a $\frac{6705}{26912}$ or about a fourth share in house No. 1, excluding therefrom premises marked E. (called *Diwankhana*) and F. out of the share belonging to defendants Nos. 1, 2, 3, and 7, only, and a $\frac{14304}{63423}$ share in house No. 2 which he held to be the joint property of defendants Nos. 1, 2, 3, 4 and 5.

The decree against defendant No. 4, appellant in this appeal, was *ex parte*.

Defendants Nos. 6, 8, and 9 appealed from the decree as to house No. 1, which was dismissed by the Divisional Judge on 28th June, 1889. They applied for revision in the Chief Court, but were unsuccessful.

Plaintiffs applied for execution in 1893 in respect of house No. 1, but their application was rejected by the first Court and the Divisional Judge. It was, however, accepted by the Chief Court and remanded to the Lower Court. In consequence of an expression of opinion in the judgment that defendants Nos. 6, 8 and 9 might apply for revision of the order of the Chief Court, an application for review was filed, which was accepted, and the case remanded for re-decision, by the Divisional Judge, of the first appeal to the Divisional Court by order dated 21st June, 1899. The Divisional Judge, Mr. A. Kensington, after a remand for further enquiry, upheld the previous order dismissing the appeal of defendants Nos. 6, 8 and 9, though on different grounds on 31st March, 1901. This decree was maintained by the Chief Court.

On 7th February 1902 plaintiffs asked for execution of the decree in respect of house No. 2. Their application was dismissed in default, and on 17th June the present application was filed.

The only question argued before me was whether or not the application is barred by time. The lower Courts have held that it is not. This is the only point for determination. Defendant No. 4 is the only appellant before me. He is jointly interested in house No. 2, and has no interest in house No. 1, but he has been a party to all the proceedings mentioned before.

The argument for the appellant divided itself into two heads:—(1) that the present application is barred under Section 230, Civil Procedure Code, and (2) that it is barred under Article 179 of the Indian Limitation Act XV of 1877.

Both contentions appear to me to be untenable. The order in appeal, taking the language of clause (a) of Section 230, Civil Procedure Code, literally, was passed on 31st March 1901 when the Divisional Judge, after a remand by the Chief Court and after a fresh enquiry by the first Court, upheld the original decree of the Divisional Judge passed in appeal in 1889. Appellant contends that he was not interested in the application of the plaintiffs for execution in which the Chief Court's order for remand was passed as he had no share in house No. 1. But clause (a) merely speaks of a decree affirming the decree sought to be enforced, and the decree of Colonel Wood in 1889, maintained by Mr. Kensington in March 1901, comes within the category.

A similar question arises under clause (2) of Article 179 which runs thus : "(where there has been an appeal) the date of the final decree or "order of the Appellate Court". Appellant contends that the appeal to the Divisional Court related to house No. 1 which did not concern him and not to house No. 2 to which the present application for execution relates. The argument under Section 230, Civil Procedure Code, and Article 179 (2) of the Limitation Act is thus practically identical.

Now there was but a single decree passed by the District Judge and not two, though all the defendants were not interested in both the properties in respect of which the decree was passed. The suit was filed on the allegation that both properties were joint and ancestral of the parties, but the decree made a distinction among the defendants and granted relief to plaintiffs in respect of the two houses specifying the defendants from whom plaintiffs were to get their share of each house. Defendants

Nos. 1, 2, and 3 were made jointly liable with defendant No. 7 with respect to one house and with defendant No. 4 (present appellant) and defendant No. 5 with respect to the other.

Reading the language of the two enactments in their plain grammatical sense, which is imperative on me in constructing all statute law in general and limitation law in particular, I am unable to introduce any addition in the section and article by which I can split the decree into two portions and differentiate the limitation applicable to each portion with reference to the decree in appeal. In my opinion we have no right to introduce any refinements in the plain language of the Legislature, which have the effect of varying its meaning. This view was taken in respect of clause 2 of Article 179 by the Bombay High Court in *Abdul Rahiman, etc., v. Mai Din Saiba, etc., (I. L. R., XXII Bom., 500)*, and I entirely agree with the reasoning adopted by the Court.

The second clause of explanation I to Article 179 has no bearing in appellants' favour. There were two properties no doubt included in the decree, and the liabilities of the various defendants distributed in two groups were somewhat different, but the decree was nevertheless joint against defendants Nos. 1, 2 and 3 in respect of both houses, and No. 4 was joined with them as regards house No. 2. This clause relates to the effect of applications for execution and not to the effect of appeal. "There is a vast distinction, to use the language of Mahmud, J., in *Mashiat-un-Nissa v. Rani, (I. L. R., XIII All., 1 F. B.)*, vide page 7 between cases in which an application for execution is made, there having been no appeal from the decree and cases in which there has been an appeal as contemplated by clause (2), Article 179. I am of opinion, therefore, that it is useless to employ the analogy of applications for execution in decrees mentioned in the 2nd clause of the explanation in interpreting clause 2 of the article. They have no connection with each other, and apart from the fact that the language of clause 2, which is plain, makes no distinction between joint decrees and several decrees against separate judgment-debtors included in single decrees, it is difficult to ignore the inference deducible from the fact that whereas the explanation has been inserted to make the distinction in respect of applications for execution mentioned in clause 4, no corresponding explanation or reservation is introduced in respect of clause 2. The Allahabad case is cited as an authority in favour of the appellant, but its facts are not exactly similar, the decree having been not joint but several against

the defendants individually, and the ruling of the majority of the Judges was differed from in a recent Calcutta Full Bench judgment (*Gopal Chunder Manna v. Gosain Das Kalay*, I. L. R., XXV Cal., 594), in which a similar interpretation to that I am disposed to put on clause 2 of Article 179 was approved and laid down. I agree with the learned Chief Justice in the last-mentioned case in preferring the reasoning and the conclusion of the two dissenting Judges in the Allahabad case to the view of the majority.

There are many authorities bearing more or less on the point before me, but I deem it useless to swell the bulk of this judgment by discussing them in detail, as I have mentioned the most recent and authoritative. There is no ruling of this Court exactly in point. *Ralla Mal v. Mussamat Malan* (8 P. R., 1905⁽¹⁾), cited by the respondent having no direct bearing on the present discussion, and I am glad that I am comparatively less fettered in the free exercise of my own judgment in construing the clause.

I accordingly hold that limitation runs both under clause (a) of Section 230, Civil Procedure Code, and clause 2 of Article 179 of the Limitation Act, 1877, from the last order in appeal, viz., that of Mr. Kensington, on 31st March 1901, and that the respondents' application is within time.

The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

NO. 9.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

NIHAL CHAND,—(PLAINTIFF),—APPELLANT,

versus

BHAGWAN SINGH, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 777 OF 1906.

Custom—Hindu Law—Alienation by sonless proprietor—Onus—Bedi Khatri of Kalewal village, of Dasuha Tahsil, of Hoshiarpur District.

Held, that it was not shown that *Bedi Khatri* of Kalewal village of Dasuha Tahsil, of Hoshiarpur District, were bound by agricultural custom, and that, therefore, a reversioner of a sonless proprietor was not competent to contest the validity of an alienation made by the proprietor.

(1) s. c. 154 P. L. R., 1905.

The test as regards presumption of applicability of custom in such cases is whether a body of *Bedis* have adopted agriculture for some generations past as their mode of earning a livelihood. If they have, the presumption is that they follow agricultural custom; if not, that they follow Hindu Law, the burden of proof of a special custom being on him who asserts it.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 25th May 1906.

Mr. Golak Nath, Advocate, for Appellant.

Rai Bahadur Bakhshi Sohan Lal, Pleader, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(12th January 1907)—Defendant No. 2 sold the land in suit on 26th May 1898 by registered deed for Rs 500, the vendor being a *Bedi Khatri* of Kalewal, *Tahsil* Dasuha, District Hoshiarpur. Plaintiff, who is admittedly a reversioner, has sued for the usual declaration. Defendant, vendee, pleaded time-bar, and also contended that the *Bedis* are not bound by agricultural custom, and so plaintiff has no right to sue. He also lastly urged that the sale was for consideration and "necessity." The first Court found the suit within time; held, on the strength of *Uttam Singh and others v. Jhanda Singh and others* (21 P. R., 1896), that these *Bedis* do follow agricultural custom; and that of the consideration-money only Rs. 65 is proved to have passed. Plaintiff got his declaration accordingly, and the vendee appealed to the Divisional Judge.

That officer held the suit within time, but went on to find that these *Bedis* do not follow agricultural custom, restricting a male owner's power of alienation. The suit having been dismissed in accordance with this finding, plaintiff appeals further to this Court, attacking only the actual finding of the lower Appellate Court regarding the non-applicability of agricultural custom to the case. There are not many published rulings relating to *Bedis* and their customs, and it seems to me impossible to lay it down that any general rule applies to them all. They are to be found in many districts in different parts of the Province. In *Khazan Singh v. Maddi* (122 P. R., 1893), *Bedis* of *Mohalla* Wahidpur, *Tahsil* Garhshankar, District Hoshiarpur, are spoken of as a non-agricultural class, though in that case holding land as *malikan kabiran*; and it was held that the burden of proving a custom whereby alienations by a deceased collateral male proprietor were liable to be contested by rever-

sioners had not been discharged. It was said that *Bedis* are more on a level with *Sayads*, *Brahmins* and *Khattris* than with ordinary agriculturists.

In *Sarup Singh v. Mussammat Jassi* (22 P. R., 1891), the *Bedis* of Gurdaspur were treated as a sub-division of the *Khattris*. After a special further enquiry it was held that these *Bedis* could adopt a wife's brother, an act that would be valid under Hindu Law, but not under *Jat* custom. The Hindu Law was not specifically followed, but this was the result. In *Uttam Singh v. Jhanda Singh* (21 P. R., 1896), we have a case of *Bedis* of Pindori Bawa Das in the Hoshiarpur District. The case was one of gift by a sonless proprietor, and the gift was held invalid. The case of *Khazan Singh* quoted above was distinguished on the score of the different circumstances of the *Bedis* concerned in it. In *Khazan Singh's* case the *Bedis* were a small group of *malkan galza*, and it was not proved that they followed agricultural custom. In the case of 1896 the whole village belonged to *Bedis* whose ancestors founded it some generations back. They form a compact body. The judgment says "and whatever the pursuits of their ancestors may have been, they are certainly now agriculturists."

In Civil Appeal No. 480 of 1903, decided by a Division Bench of this Court, it was held that certain *Bedis*, who came and settled in Una and followed pursuits other than agriculture, did not follow general Punjab custom. The test, then, as regards presumption appears to be whether a body of *Bedis* have adopted agriculture for some generations past as their mode of earning a livelihood. If they have, the presumption is that they follow agricultural custom; if not, that they follow Hindu Law, the burden of proof of a special custom being on him who asserts it.

This village belonged originally to the *Gujars*; but on their failure to pay revenue, Ajaib Chand, father of plaintiff and of the vendor, bought it. He is said to have come from Lutiyan, District Hoshiarpur, in *Sambat* 1931=A. D. (1874-75). We have no evidence as to the custom or law followed by the *Bedis* of Lutiyan, and thus, as matters stand, it can hardly be said that, in the matter of alienation, any custom can as yet have been adopted or followed by this family in regard to alienation of ancestral estate. Plaintiff and his brothers are the first *Bedi* holders of ancestral estate in the village. The *onus* of proof is thus on plaintiff, and he has in no way discharged it.

It is not suggested that an enquiry at Lutiyan would help much.

I would agree with the learned Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 10.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

SHAH NAWAZ, AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

AZMAT ALI,—(PLAINTIFF),—RESPONDENT.

CASE No. 493 OF 1905.

Custom—Muhammadan Law—Alienation—Sale by sonless proprietor—Gilani Sayads of Masania village, Batala Tahsil of Gurdaspur District—Necessity—Aqiqa ceremony of deceased son.

Held, that *Gilani Sayads* of Masania village of Batala Tahsil, of Gurdaspur District, were governed by custom restraining alienation of ancestral land by a proprietor in the absence of valid necessity.

Held, further, that money borrowed by a proprietor for performing *aqiqa* ceremony of his deceased son must be held to have been done for a valid necessity.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 1st February 1905.

Mr. Muhammad Shafi, Advocate, for Appellants.

Mr. Pestonji Dadabhoy, Advocate, for Respondent.

JUDGMENT.

LAL CHAND, J.—(19th December 1906).—The parties to this suit are *Gilani Sayads* of Mauza Masania, in Tahsil Batala, District Gurdaspur. On 28th February 1895, Madad Ali, defendant, sold 112 *kanals* and 12 *marlas* of land to Muhammad Hussain, defendant No. 2, for Rs. 1,500, as entered in the sale-deed. Defendants Nos. 3 and 4 sued for pre-emption and obtained a decree for possession on payment of Rs. 1,200, which was held to be the price fixed and paid for the sale. The present suit was instituted in May 1902 by Azmat Ali, plaintiff, brother of Madad Ali, vendor, for a declaration that the sale was not effected for consideration and necessity, and shall not affect his reversionary interest. The Divisional Judge has held that there was no necessity for an out-and-out sale, but that the sum of Rs. 1,200 was *bonâ fide*, and that there is reason to infer from plaintiff's silence that it was a valid and genuine transaction. He has accordingly decreed the suit subject to payment of Rs. 1,200. Both parties have appealed. It is contended for defendant-

appellants that Madad Ali, vendor, had an unrestricted power to alienate, and that in any case the whole sum of Rs. 1,200 being found to have been borrowed for necessity, the sale ought to have been upheld as an absolute and permanent alienation. For the plaintiff it is contended that no valid necessity for the whole amount of Rs. 1,200 is made out, and a decree should have been passed subject to payment of Rs. 500 only as due on prior encumbrances. After hearing arguments and referring to the record, we have very little difficulty in holding that Madad Ali had only a restricted power of alienation, and that plaintiff, his brother, is competent to question the validity of the sale in suit. It is admitted that the whole village of Masania is owned by the *Sayads* as a village community. It was founded by a common-ancestor, nine generations back, and it is proved on the record that these *Sayads* cultivate their own lands personally and of others as tenants. They occasionally receive gifts from religious disciples, but the income so earned is not shown to form their principal source of livelihood. Their chief occupation evidently is agriculture, and they have been classed as agriculturists in the district under the Land Alienation Act. The facts, therefore, are in the main similar to *Uttam Singh v. Jhanda Singh* (21 P. R., 1896), a case of *Bedis* of Hoshiarpur; and the mere fact that the parties are *Sayads* by caste is altogether inconclusive, as in several cases in different parts of the Province *Sayads* have been found to follow agriculture as their calling and the customs of agricultural tribes as the dominant rule of their personal law. Moreover, it is proved on the present record that in several matters relating to succession and alienation these *Sayads* have adopted agricultural customs, and a separate *Riwaj-i-am* incorporating their usages was prepared and attested at Settlement in 1868. There is, therefore, ample reason for holding that the parties are agriculturists, and that the initial presumption against an unrestricted power of alienation is applicable to them. It was, however, contended for defendants that such presumption, if any, was rebutted in the present case by a number of alienations effected in the village which was never challenged. These alienations, altogether seventeen in number, were proved by filing certain extracts from the mutation register; but as pointed out by the first Court, no attempt was made to indicate the circumstances under which these alienations were effected. It is quite conceivable that some may have been effected for necessity and certain others with consent or in favour of the next reversioners. Such instances in no way rebut the initial presumption against an unlimited

power of alienation. It is not sufficient to rebut such presumption that a number of alienations were effected by members of the tribe to which the parties belong, unless it is further proved that the alienations effected were such as are unauthorised by the Customary Law. We, therefore, hold that the defendants have not succeeded in rebutting the initial presumption that Madad Ali had only a restricted power of alienation. Plaintiff, therefore, is competent to question the validity of the sale in dispute; and the further question for consideration is whether the sale was effected for necessity. There was not such delay in instituting the suit as would support an inference of acquiescence. It is further unnecessary to decide in this case whether the Divisional Judge was justified in cancelling the sale and in passing only a conditional decree having found necessity for the entire amount, for we are inclined to hold on plaintiff's appeal that the whole amount of Rs. 1,200 was not paid or borrowed for necessity. Only two items are in dispute, *vis.*, Rs. 200 alleged to have been spent by Madad Ali, on the *aqiqa* ceremony of his son and marriage of his first cousin, and Rs. 500 which is stated to have been invested some four months after sale in a mortgage which was admittedly redeemed three years later. As regards the last item, we fail to see any necessity. There obviously existed no necessity for such investment when the sale in dispute was effected, especially as Madad Ali then held and owned other lands which he had purchased from his brother in 1892 for Rs. 700. The investment could not be treated even as an act of proper management in this case, as only a temporary mortgage was taken four months later which after redemption left the money again in Madad Ali's hands as altogether uninvested. We cannot, therefore, hold that there was any necessity for Rs. 500. As regards Rs. 200 stated to have been spent by the vendor on the *aqiqa* ceremony of his son and the marriage of his first cousin, we see no good reason to disallow the amount either as unproved or as unnecessary. The expenditure incurred for a religious ceremony is a necessity, and there is no allegation here that the amount so spent was extravagant. As regards the money defrayed on marriage of *Mussamat* Fatima, first cousin of the vendor, we hold that it was a necessity in this case, as Madad Ali received the inheritance which would have gone to Fatima's father, but for the circumstance that he died during the lifetime of his father, the common-ancestor of the parties. Plaintiff himself has shared in the inheritance so left, and it is not open to him to contend that the marriage expenditure to which he was bound to contribute

equally was unnecessary. We, therefore, hold that there was necessity for Rs. 700, including Rs. 500, due to prior encumbrances, and decree plaintiff's appeal accordingly. The defendants' appeal is dismissed and plaintiff's accepted so far as to reduce the amount held payable by him from Rs. 1,200 to Rs. 700. Under the circumstances we leave the parties to bear their own costs throughout, as they have succeeded about equally.

APPELLATE SIDE.

No. 11.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Muhammad Shah Din.

NIHAL DEVI, AND OTHERS,—(DEFENDANTS),—APPELLANTS,
versus

SHIB DIAL,—(PLAINTIFF),—RESPONDENT.

CASE No. 1288 OF 1905.

Hindu Law—Maintenance—Wife's right of residence in ancestral family house against creditors' right to sell it to recover family debts.

Held, that a Hindu widow or wife is not entitled to claim residence in the family dwelling house against the creditors' right to proceed against it in execution of a decree obtained by him to recover just family debts.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 8th May 1905.

Lala Beni Pershad, Pleader, for Appellants.

Mr. Bodh Raj, Pleader, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(22nd December 1906).—The sole question for decision in this case has been thus stated by the learned Judge who admitted the petition for revision under Section 70 (1) (b) of the Act. When a Hindu owner possesses one house (family house) only, are alienations made by him to be considered always subject to his wife's right of residence as wife or widow, or under what circumstances would this be or not be the case?

He calls it the main question in the case. Inasmuch as the first ground in the petition has been abandoned, it is now the sole question.

Ghasita Mal was the owner of the house, so far as I have been able to ascertain it from the record, the history of the house in suit has been

as follows (I may first note that the late Ghasita Mal's family are *Khatris* and subject to Hindu Law, as it is understood in the Punjab).

Before 1895 Ghasita Mal was already in debt to the sum of Rs. 800, and for this sum a house (*not in suit*) was already mortgaged. On 14th November 1895 he borrowed of plaintiff Rs. 900 on a mortgage of that same house to pay off that debt, the rest being taken for litigation and family expenses. On 26th July 1900 plaintiff, having sued Ghasita Mal, obtained a decree for Rs. 1,323 and costs in the Court of Additional District Judge. He proceeded to execute and objections made to attachment and sale were disallowed under Section 281, Civil Procedure Code. The mortgaged property was sold by auction for Rs. 1,125, of which Rs. 1,068-12 net came to plaintiff. There still remained Rs. 235 due, and under two other decrees Rs. 195 was also due. In consideration of these two items (to which was added Rs. 20, registration, etc., expenses), Ghasita Mal mortgaged *the house in suit* for Rs. 450 on 26th July 1901. These decrees were all against Ghasita Mal. On 7th August 1903 plaintiff filed a suit upon the deed just mentioned, and on 31st August 1903 obtained a decree for Rs. 506-10 and costs, chargeable on the house. Execution was sued out in October, and soon after Ghasita Mal died on 17th February 1904, plaintiff asking successfully that his minor son (now defendant No. 3) be substituted for him. Meantime the widow (defendant No. 1) in December 1903 had filed objections to execution against the house, but these were dismissed for default on 18th March 1904. Again, on 1st June 1904, the widow filed objections under Section 332, Civil Procedure Code, and on 11th August the executing Court ruled that her rights of residence must be reserved in the auction-sale of the house. On 30th August 1904 plaintiff brought this present claim for a declaration that the house was liable to attachment and sale in execution of his decree without any reservation of the lady's right of residence, and he made the lady and her minor son and daughter defendants.

We have been referred to a number of rulings and also one or two text-books. Mayne's ideas regarding widow's right of residence in the ancestral house are given at para. 465 of the 7th edition of his book on Hindu Law and Usage, the preceding paras. being taken up with a discussion of her right to maintenance from her husband's estate. In Banerji on Hindu Law of Marriage and *Stridhan* (1879), pages 150 *et seq.*, the same questions are discussed at length, and at page 204 a distinction is drawn between a widow's claim upon the ancestral

residence when it is in the hands of a member of the family, or in the hands of an outsider, to whom it has been alienated in order to defeat her just claims, and her claim upon it when it has been alienated to an outsider in the ordinary way for payment of family debts.

On behalf of the widow appellant, Mr. Beni Pershad has quoted the following rulings:—*Bhikham Das v. Pura*⁽¹⁾; *Talemand Singh v. Rukmina*⁽²⁾; *Venkatammal v. Andyappa Chetti*⁽³⁾; *Fakir Chand v. Mussammat Chiranji*⁽⁴⁾; *Jowahir Singh v. Mussammat Ram Devi*⁽⁵⁾. On the other side we have had our attention drawn to Civil Appeal No. 945 of 1900 (Chief Court), *Jamna v. Machul Sahu*, I. L. R., II All., 315; *Soorya Koer v. Nath Bukhsh Singh*, I. L. R., XI Cal., 102; *Natchiarummam v. Gopalakrishna*, I. L. R., II Mad., 126; *Ramanadan v. Rangammal*, I. L. R., XII Mad., 260 (F. B.); *Manilal v. Baitara*, I. L. R., XVII Bom., 398; *Mussammat Karam Kaur v. Mussammat Kishen Devi*, 39 P. R., 1896; *Shri Beharilalji Bhagwatprasadji v. Bai Rajbai*, I. L. R., XXIII Bom., 342; *Mussammat Gomti v. Chuttan Lal*, 190 P. R., 1889.

These are relied upon chiefly to establish the distinction that when the ancestral house has been alienated for family debts, the widow's right of residence is not recognised.

In *Bhikham Das v. Pura* ⁽¹⁾, the question was whether in view of the widow's claim to reside in the ancestral house, a mortgage of it by the late male owner could be enforced by its attachment and sale. This was decided in the affirmative; but the further question whether the auction-purchaser could eject the widow, was not decided. This case helps neither party here.

In *Talemand Singh v. Rukmina* ⁽²⁾ the facts are somewhat complicated, and the judgment very brief. The finding is that the widow of a member of a joint Hindu family can claim a right of residence in the family dwelling house, and can assert such right against the purchaser of such house at a sale in execution of a decree against another member of such family. The house was owned jointly by the widow's late husband and a cousin of his. The debt was the latter's debt, and the decree was against him alone. The widow had resided in the house after her husband's death and before the decree aforesaid was passed or executed. This ruling then does not seem to me to

(1) I. L. R., II All., 141.

(3) I. L. R., VI Mad., 180.

(5) 112 P. R., 1888.

(2) I. L. R., III All., 353.

(4) 84 P. R., 1883.

conflict with the theory, relied on by the respondents in the present case, of the non-recognition of the widow's rights when the alienation was for family debts.

In *Fakir Chand v. Mussammat Chiranji* (84 P. R., 1883), we find the same thing. The alienation was found to have been effected for purposes not binding on the family; and a similar finding in *Jowahir Singh v. Mussammat Ram Devi* (112 P. R., 1888), renders that ruling also useless to appellant. There the debt was an extravagant one for the purpose of the marriage of one of the two sons of the deceased husband of the lady claiming residence, and it was incurred by the two sons and not by the deceased.

In *Venkatammal v. Andyappa Chetti* (I. L. R., VI Mad., 130), it was held that in the *circumstances* of that case the widow's right of residence must be recognised, and that the house, about to be sold for a mortgage-debt, must be sold subject to that right. Here, again, we must take the *dictum* as applying to the facts of the case itself and to similar states of facts only. The debts were incurred by the lady's son after her husband's death in certain large transactions, not for the joint benefit of the son and the lady.

Turning to the case quoted by Mr. Sawhney for respondent, I note that Civil Appeal No. 945 of 1900 (Anderson and Robertson, JJ.) lays it down that a widow "should not be turned out of the family house unless the debts on account of which alienation is being made have been shewn, to the satisfaction of the Court, to be *bonâ fide* family debts; and on the facts the finding was that the consideration for the alienation was unjustifiable, if not immoral." With the *dictum* in this ruling I fully agree. It seems to me to provide a simple, intelligible and just rule, and it applies in the present case, for I have no doubt at all that the debt here was a family debt, incurred by Ghasita Mal himself in the ordinary way of such things for no immoral purpose and with no similar design to injure the widow or the children. The Muhammadan wife or widow is a creditor of her husband on account of her dower, which is a debt, and she is perhaps, as regards his estate, a creditor preferred to all other creditors. But a Hindu wife or widow is no creditor on account of her maintenance or right of residence. If the estate has dwindled to nothing as a consequence of family expenditure and family debts incurred by her husband in the ordinary way of business and living, I cannot see that

anything remains for her any more than for her husband or her husband's heirs.

These being my views, I need hardly discuss at length any more of Mr. Sawhney's precedents. I will, however, merely state that in *Jamna v. Machul Sahu* (I. L. R., II All., 315) the husband had made a gift of his whole estate to his nephew, and of course the widow's rights were held not destroyed; that in *Natchiarammal v. Gopalakrishna* (I.L.R., II Mad., 126) a sale for a family debt was held sufficient to protect property sold in satisfaction of that debt from widow's claim to maintenance; that *Ramanadan v. Rangammal* (I. L. R., XII Mad. 260) (F B.) distinguishing *Venkatammal v. Andyappa* (I. L. R., VI Mad., 130) lays it down that where the debt was a just family debt, the widow's right of residence in the house sold for that debt is not recognised; that in *Manilal v. Baitara* (I. L. R., XVII Bom., 398), the test in such cases was stated to be whether the mortgage was for the benefit of the family, or was in any way in fraud of the widow's rights; that in *Mussammatt Karam Kaur v. Mussammatt Kishen Devi* (39 P. R., 1896) the debt was a just family debt, and apparently another house was available for the widow, who therefore was held not entitled to claim residence in the ancestral house even from a purchaser with notice of her claim. The other cases I need not mention at all. My view, then, is that this appeal must fail. I would dismiss it with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 12.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Rattigan.

MUHAMMADI BEGAM, AND OTHERS,—(PLAINTIFFS)—APPELLANTS,

versus

FAIZ MUHAMMAD KHAN,—(DEFENDANT)—RESPONDENT.

CASE No. 1201 OF 1901.

Custom—Alienation by childless male proprietor—Acquiescence by father of plaintiff.

A childless male proprietor sold his ancestral property by two sales in 1897 and 1900. The plaintiff, his nephew, sued to set aside the sale in 1903. It appeared that the plaintiff's father took no steps to challenge the validity of the sale and he did not die till about a year after the second sale.

Held, that the suit must be dismissed, for the plaintiff must be held bound by the acquiescence of his father.

Mr. Harris, Advocate, for Appellants.

Mr. Devi Dial, Advocate, for Respondents.

JUDGMENT.

RATTIGAN, J.—(7th November, 1906).—The parties are *Afghans* of the Jhajjar *Tahsil*, Rohtak District. Briefly the facts of the case are that on the 5th June, 1897, one Saadulla Khan, the paternal uncle of plaintiffs, sold his house to defendant for a sum of Rs. 160, and on the 16th March, 1900 he sold certain land to the same vendee for Rs. 50. The property so sold was admittedly ancestral.

After the death of the vendor, his nephews brought the present suit (on the 24th October, 1903) for possession of the aforesaid property, on the ground that the sales in question were without consideration and necessity, and therefore not binding upon them. The defendant pleaded that the sales impeached were valid; that there was consideration and also necessity therefor; and that, in any event by the custom of the parties' tribe, a proprietor had an unrestricted power of alienation even in respect of ancestral property.

The first Court held all defendants' pleas to be well founded and dismissed the suit. This decree was upheld by the Divisional Judge on appeal, but the learned Judge decided the case on the point of custom alone, and held that among the *Afghans* of Rohtak District a sonless proprietor had an absolute right to dispose of his property, ancestral or acquired, as he pleased. Upon this finding it was obviously unnecessary for the lower Appellate Court to give any decision upon the questions of consideration and necessity. Plaintiffs have preferred a further appeal to this Court, and it has been strenuously argued on their behalf that the alleged custom is entirely opposed to the general rule obtaining among agricultural tribes in the Punjab, and that the *Riwaj-i-am* and Tupper's Customary Law (Volume II, page 178), do not support the conclusions of the learned Divisional Judge. We do not, however, feel called upon to determine this question, as we are of opinion that the first Court was fully justified under the circumstances of the case in assuming that consideration and necessity were sufficiently established.

It is to be noted that at the date of the first sale (in 1897) the father of the plaintiffs was alive, and it is admitted that he did not die until about a year after the date of the second sale. He was the real brother of the vendor and had sons of his own, and it is difficult to believe that he would have taken no steps to invalidate those alienations as against his and his son's reversionary interests, had he not realised that

in effecting the alienations his brother was acting prudently and economically, and that the sales were for "necessary purposes". In point of fact he seems to have acquiesced in the sales, and it is admitted that he took no action whatever, during his lifetime, to impugn their validity. It is only after his death, and after the death of the vendor, that this suit is instituted, some seven years after the date of the first sale. We can find no ground for suspecting collusion between plaintiff's father and the vendor. On the contrary, it was obviously in the interests of the former to challenge the sales had he not been assured of their validity. His abstention from taking proceedings is, therefore, *per se*, a good ground for presuming that he was satisfied that his brother had "necessity" for alienating the property. Then, again, there is the fact that the two sales were for small amounts, the consideration in the one case being Rs. 160, and in the other Rs. 50. We fail to see any ground for suspecting that these small sums were raised for no sufficient purposes. Taking everything into consideration, and in view especially of the facts that plaintiff's father apparently accepted the sales as valid, and no steps were taken to impeach their validity until seven years after the date of the first sale, we do not think that plaintiffs can expect from defendant any more definite and clear proof of necessity than has been given in this case.

We do not feel called upon to give any opinion, under these circumstances, as to the power of a sonless proprietor in this tribe and tahsil to dispose of his ancestral property at his pleasure. The customary rule alleged by defendant is without doubt exceptional, but on the other hand it is well known that Afghan settlers, especially in these parts of the Punjab which were brought within the limits of this Province only after 1857 and then for administrative purposes, do not observe in their entirety the customary rules which are generally in vogue among the agricultural tribes of Punjab proper. The customs of the tribes in the Rohtak District as summarised in the volume of Tupper's "Customary Law" above referred to are not, we think, very clearly set forth, and the answers to questions do not appear to be altogether consistent (see paras. 24, 25, 27). Nor is it an easy task to construe the provisions of the vernacular *Riwaq-i-am* prepared by Pandit Maharaj Kishen, so far, at all events, as this question of the power of disposition possessed by a sonless proprietor is concerned. But upon the whole it would certainly seem that in this district such a proprietor is conceded rights which are considerably more extensive than the rights recognised by custom in other parts of this Province. As already observed we re-

frain from giving any definite opinion upon this point, and we merely allude to the subject for the purpose of pointing out that it may have been for this reason that plaintiff's father abstained from taking any action in respect of his brother's sale. For our own part we consider that it was more probably because he felt that these sales were for valid necessity that he acquiesced in them ; but whatever may have been the reason for his inaction, we are of opinion that the first Court was justified in holding that the sales were valid and binding upon plaintiffs. We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 13.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

ISHAR,—(DEFENDANT),—APPELLANT,

versus

PARTAP SINGH,—(PLAINTIFF),—RESPONDENT.

CASE No. 1247 OF 1905.

Limitation Act (XV of 1877), Schedule II, Article 118—Limitation—Adoption—Suit for possession of immovable property in which defendant sets up adoption as defence in support of right to hold property.

When a suit for possession of immovable property is filed and the defendant sets up right to hold the property by reason of his being the adopted son of the deceased owner of the property—

Held, that article 118 of the second Schedule of the Limitation Act applies to the case and the period of limitation begins to run from the date the alleged adoption became known to the plaintiff.

Further appeal from the decrees of J. G. M. Rennie, Esquire, Divisional Judge, Jullundur Division, dated 30th August, 1905.

Mr. Golak Nath, Advocate for Appellant.

Mr. Muhammad Shafi, Advocate for Respondent.

JUDGMENT.

CLARK, C. J.—(14th December, 1906).—The facts of this case are that on 17th December, 1889 Bhup Singh executed and registered a deed by which he made Ishar Singh, defendant, his daughter's son, his heir.

Bhup Singh died on 25th December, 1890, and mutation of names was made in favour of his widow, *Mussammat Kirpo* ; she died on 6th July, 1893, and on her death mutation of names was made in favour of defendant in August, 1893.

On 17th August, 1904 plaintiff as reversioner of Bhup Singh brought this suit for possession of Bhup Singh's land.

The first question for decision is, whether the deed of 17th December 1889 was an adoption or a will. The document describes itself as a will and was registered as a will. Its terms are that Bhup Singh had no son but a daughter's son, aged 12, whom he had brought up as a son, and who had been living with him for a long period, and whose marriage he had made, and who had cared for him in the past, and was likely to care for him in the future, which no reversioner was likely to do: he therefore wills his land to him after his death.

This is, no matter how described, with which Bhup Singh probably had nothing to do, simply the ordinary deed of appointment of an heir, and there was prior and subsequent treatment as heir.

The deed in *Bhupa v. Nigahia* (68 P. R., 1903 (1)), also described itself as a will, whereas it in reality was an appointment of an heir.

In the mutation proceedings on the death of *Mussammatt Kirpo* it was as adopted son so described that mutation was made in favour of Ishar Singh. I am, therefore, of opinion that the deed should be treated as a deed of appointment of heir or customary adoption.

It is argued that as it was registered as a will, a copy could not be obtained till Bhup Singh's death; but as Bhup Singh died in 1890, this is not of much consequence, and it is clear that in 1893, when mutation was made, Ishar Singh's claim as adopted son was well-known.

It also appears that in June, 1891 the present plaintiff by his mother sued one Man Singh to set aside an alienation made in his favour by Bhup Singh, and the fact of adoption was pleaded by Man Singh as barring plaintiff's right to sue. The finding was that the adoption was not valid, but that finding is of no force against Ishar Singh, who was no party to the suit, and it shows clearly that plaintiff must have known of the adoption as far back as 1891.

Plaintiff appears to have attained majority in 1895, he entered the army in 1901, and no good reason is put forward for his not having sued before.

The question then arises whether plaintiff's suit is barred by limitation under Article 118, Schedule II of the Limitation Act.

There are numerous decisions of this Court holding that such suit is barred by limitation.

(1) S. C., 13 P. L. R., 1904.

They are all quoted in *Bhapa v. Nigahia* (68 P. R., 1903 (1).)

The matter was also discussed at some length in *Dheru v. Sidhu* (56 P. R., 1903(2), F. B.) Two of the Judges (Chatterji and Anderson JJ.) were of opinion that such suits for possession were barred by limitation when the suit had not been brought within the period prescribed in Article 118.

The question with reference to adoption did not actually arise in the case. I expressed no opinion on the substantive question. I only expressed an opinion that the remarks of the Privy Council in *Malherjun's case* (I. L. R. XXV Bom., 337, P. C.), should not be taken to lay down any new principle or do anything more than re-affirm what was laid down in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri* (I. L. R., XIII Cal., 308, P. C.)

On the substantive question I see no sufficient reason for departing from the course of decisions of this Court, and I hold that plaintiff not having sued within the period prescribed by Article 118, his suit is barred by limitation. It remains to deal with one argument used on behalf of plaintiff.

It was argued that as *Mussammat Kirpo* died in 1893, no suit would lie after that date for a declaration that the adoption was invalid ; that only a suit for possession would lie, and that therefore Article 118 could not apply ; the fact that plaintiff was a minor at the time preventing the limitation from beginning to run between the execution of the deed and 1893.

It is not possible to say that suit for declaration of invalidity of adoption would not lie, though possession of the land would be a consequence of success, yet it would not be the only consequence, and such suit might be brought for other reasons than possession of the land ; *e. g.*, for the honour of the family, or to prevent collateral succession.

Besides, the Privy Council ruling in *Jagadamba's case* was that a suit for possession, where there was an effective adoption in dispute, was a suit to set aside an adoption, and attracted the consequence that the time for suing ran from the date of adoption. I, therefore, overrule this argument.

I accept the appeal and holding the claim barred by limitation, I dismiss the suit with costs throughout.

Appeal dismissed.

(1) S. C., 13 P. L. R., 1904 ;

(2) S. C., 93 P. L. R., 1903.

APPELLATE SIDE.

No. 14.

CIVIL.

Before Mr. Justice Lal Chand.

LAKHA SINGH,—(DEFENDANT)—APPELLANT,

versus

JOTA SINGH,—(PLAINTIFF)—RESPONDENT.

CASE No. 794 OF 1904.

Custom—Alienation—Estoppel—Acquiescence by father of reversioner—Son bound by father's acquiescence.

The father of the present plaintiff expressed his willingness at mutation proceedings to take property alienated by a sonless proprietor for the sum paid by the alienee, but took no proceedings against the alienee.

Held, that the plaintiff's father must be deemed to have acquiesced in the alienation, and the plaintiff was thereby debarred from objecting to it.

Miscellaneous further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 8th June 1904.

Mr. Turner, Advocate, for Appellant.

Mr. Dhan Raj Shah, Advocate, for Respondent.

JUDGMENT.

LAL CHAND, J.—(8th December 1906).—The question for decision in this appeal is whether the sale sought to be impeached by the plaintiff was accepted by his father, and plaintiff is therefore estopped from suing for possession of the property sold on the ground that the sale was not effected for necessity. The lower Courts have differed, but it appears to me that the lower Appellate Court has not correctly referred to the contents of the mutation proceedings of 1388 in connection with the question of waiver. Plaintiff's father, Jamiat Singh, did not simply object to the sale, but he objected to the sale on the ground that he was ready to pay the money, and he was accordingly directed by the officer conducting the proceedings to sue for pre-emption. This he failed to do, nor did he sue for a declaration that the sale will not affect his reversionary rights as being without necessity. On the other hand, a declaratory suit impeaching the validity of a subsequent sale by Fateh Singh in 1891 was instituted in 1898 by the present plaintiff through his guardian. Under the circumstance, I am of opinion that the sale in question has been acquiesced in as a valid sale, and such acquiescence estops plaintiff from suing for possession. This view is supported by

Amir v. Mussammat Zebo (42 P. R. 1902) ; *Labh Singh v. Gopi* (15 P. R., 1903⁽¹⁾), and *Muhammadi Begam v. Faiz Muhammad Khan*, an unreported judgment in Civil Appeal No. 1201 of 1905⁽²⁾ quoted by the learned counsel for appellant. It was laid down in *Amir v. Zebo* that subsequent silence may amount in some cases to conduct precluding a suit to set aside the alienation, and the same view was concurred in, and given effect to, in the unreported judgment quoted for appellant. *Labh Singh v. Gopi*⁽¹⁾ was a case where a suit instituted for pre-emption of the property sold, but dismissed on account of failure to deposit the purchase-money, was held to debar the pre-emptor's grandson from suing to impeach the sale as invalid for want of necessity. The present case is not much different from the case in *Labh Singh v. Gopi*⁽¹⁾. Here no suit for pre-emption was brought and allowed to be dismissed, but plaintiff's father challenged the sale, not for want of necessity but on the ground that he was ready to pre-empt, which he never did, though he survived the sale at least for seven years. His omission at mutations to attack the sale as unnecessary, and readiness to take it over on payment of price coupled with his subsequent silence and plaintiff's own action, though through a guardian impeaching a subsequent sale in which he was successful, and taking no action as regards the sale now in suit till two years after attaining majority, are circumstances in the case which prove that the sale sought to be impeached has been acquiesced in as a valid sale. I, therefore, accept the appeal, set aside the order of remand, and restore the decree passed by the first Court dismissing plaintiff's suit with costs throughout.

Appeal accepted.

REVISION SIDE.

No. 15.

CIVIL.

Before Mr. Justice Reid.

AIWAZ, AND ANOTHER,—(PLAINTIFFS)—PETITIONERS,

versus

SIMLA-KALKA RAILWAY COMPANY,—(DEFENDANT)—RESPONDENT.

CASE No. 1880 OF 1905.

Railways Act (IX of 1890), Sections 72 and 75 (1)—Railway—Declaration of contents of box containing currency notes, ornaments, etc.—Claim for compensation does not lie when no declaration made in respect of box booked by luggage-van—Cause of action.

Held that when a passenger has booked, by Railway luggage-van, a box containing silver and gold ornaments, currency notes and other articles, without

(1) S. C., 55 P. L. R., 1903.

(2) S. C., 12 P. L. R., 1908.

making a declaration, as required by section 75 of the Indian Railways Act, and the box is lost, no suit for compensation against the Railway is maintainable.

Petition for revision of the order of Lieutenant Colonel R. E. S. Taylor, Judge Cantonment Small Cause Court, Ambala, dated 12th August 1905.

Mr. K. C. Chatterji, Pleader, for Petitioners.

Mr. Morrison, Advocate, for Respondent.

JUDGMENT.

REID, J.—(10th November 1906).—This application raises the question whether a Railway passenger whose box, containing clothes, gold and silver ornaments of the value of Rs. 20 or 30, and Government Currency notes of the value of Rs. 190 has been entrusted to the Railway Company's servants for conveyance in the luggage van and has been lost or stolen, can recover the value of the box or of any part of its contents from the Company without having made the declaration prescribed by section 75 (1) of the Indian Railways Act, IX of 1890.

The first contention for the applicant was that "any parcel or package" in section 75 (1) does not include passenger's "luggage" dealt with by section 74 of the Act. This contention has no force. The object of the rule contained in section 74 is obviously to make the company liable only for property entrusted to it and not for property which a passenger chooses to keep in his own custody, whether in his compartment or elsewhere, and luggage consists of "parcels and packages."

The next contention was that section 72 of the Act makes the company liable as a bailee under the Indian Contract Act.

The presence in the section of the words "subject to the other provisions of this Act" adequately meets this contention which has no force.

The next contention was that currency notes are not included in the second schedule to the Act. Clause (b) of the schedule in my opinion, covers them. They are promises to pay made by a person on behalf of the Government of India, although they are not included in the definition of Promissory Note in section 4 of the Negotiable Instruments Act for the purposes of that Act.

They are, moreover, securities for the payment of money, even though they may not be bank notes. This contention has no force. The last contention is that the company were liable for the whole value of the non-scheduled of the contents of the box and of currency notes up to Rs. 100.

Muhammad Abdul Ghaffur v. Secretary of State for India in Council, 56 P. R. 1897 is directly against this contention and section 75 (1) provides for freedom from responsibility, for the "loss, destruction or deterioration of the parcel or package," not merely for freedom from responsibility for the loss of the contents of such parcel or package.

The applicant is not, in my opinion, entitled to recover from the company in respect of the box or of any part of its contents not having complied with the provisions of section 75 (1) of the Act.

The application is dismissed with costs.

Application dismissed.

REVISION SIDE.

No. 16.

CIVIL.

Before Mr. Justice Reid.

MOHKAM DIN, AND OTHERS,—(PLAINTIFFS)—PETITIONERS,

versus

MANSAB DAR, AND OTHERS—(DEFENDANTS)—RESPONDENTS.

CASE NO. 1920 OF 1906.

Northern India Canal and Drainage Act (VIII of 1873), Sections 21, 22, 24, 25—Canals—Jurisdiction of Civil Court—Injunction against party whom permission is given to construct channel through the land of another.

When permission has been granted to a person under the Canals Act, VIII of 1873 to construct a water channel through the land of another and the procedure prescribed by the Act has been complied with, the Civil Court cannot entertain a suit for an injunction against the party whom permission is given restraining him from constructing the channel.

Petition for revision of the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 17th July, 1906.

Lala Ram Lal, Pleader, for Petitioners.

Pandit Sheo Narain, Pleader, for Respondents.

JUDGMENT.

REID, J.—(17th January, 1907.)—The question for consideration is whether a Civil Court has jurisdiction to decree a perpetual injunction restraining a party, to whom permission has been granted under the

Canal Act VIII of 1873, to construct a water channel through the land of another from constructing that channel.

Kadir Bakhsh v. Bhayat Ram (71 P. R., 1888), *Mektab Singh v. Hakim* (114 P. R., 1888), *Bhambu Ram v. Chhatta Mal* (144 P. R., 1894) and *Lakh Ram v. Secretary of State for India in Council* 64 P. R., 1897 or authority for holding that Civil Court has no jurisdiction provided that the procedure prescribed by the Act has been complied with.

The procedure adopted was not attacked in the plaint and no irregularity has been pointed out at the hearing.

The plaint alleged that the proposed water channel would injure the plaintiff's cultivation and the question of compensation is left by the Act to the Collector. It has not been alleged that the assessment of compensation was inadequate and the plaint does not contain any allegation which could not have been urged in the proceedings of the Canal Officer or Collector. The fact that the proposed water channel was to run through the plaintiff-petitioner's land does not in my opinion affect the question. The jurisdiction is the same whether the plaintiff asserts a right to cut a channel through the land of another, or to prevent another from cutting a channel through his land.

The rule laid down in *Kishori Mohan Roy Chowdhry v. Chunder Nath Pal*, I. L. R., XIV Cal., 644 is general and specifically excepts cases from which the jurisdiction of the Civil Court is ousted. For these reasons I dismiss the application with costs.

Application dismissed.

APPELLATE SIDE.

No. 17.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

MUL RAJ,—(PLAINTIFF),—APPELLANT,

versus

LADHA MAL,—(DEFENDANT),—RESPONDENT,

CASE No. 1105 OF 1906.

Civil Procedure Code (Act XIV of 1882), Section 526—Arbitration—Award—Appeal against order refusing application to file private award.

Held, that an appeal lies against an order refusing an application to file a private award made under Section 526 of the Civil Procedure Code.

Further appeal from the decrees of Shaikh Asghar Ali, Additional Divisional Judge, Sialkot Division, dated 13th July, 1906.

Bhagat Ishwar Das, Pleader, for Appellant.

Pandit Sheo Narain, Pleader, for Respondent.

JUDGMENT.

ROBERTSON, J.—(6th May, 1907.)—The question before us is whether or not an appeal lies from an order under Section 526, Civil Procedure Code, refusing to file an award of arbitrators made out of Court.

The learned Divisional Judge, following the Allahabad ruling in *Katik Ram v. Babu Lal*, (I. L. R., XXVI All., 205) has decided that no appeal lies. As pointed out, however, by a Division Bench of this Court in Civil Appeal No. 862 of 1906 the contrary view has been taken in by at least two other High Courts, i. e., by Madras in *Ponnusami Mudali v. Mandi Sundara Mudali* (I. L. R., XXVII Mad. 255), and *Thiruvengadathiengar v. Vaidinatha Ayyar* (I. L. R., XXIX Mad., 303), and by Calcutta in *Muhammad Wahid-ud-Din v. Hakimian* (I. L. R., XXV Cal., 757), and *Janokey Nath Guha v. Brojo Lal Guha* (I. L. R. XXXIII Cal., 757), and by this Court in *Jhangi Ram, v. Mussammat Budho Bai*, (84 P. R., 1901⁽¹⁾, F. B.). The ruling last quoted has been followed in various unpublished judgments (see Civil Appeal No. 989 of 1903, decided on 8th April, 1905 and No. 1298 of 1906 decided on 19th March 1907) and is supported by the remarks of their Lordships of the Privy Council on pages 99 of *Ghulam Jilani v. Muhammad Hussan* (25 P. R., 1902, ⁽²⁾ P. C.) The point has also not been touched in the recent Full Bench decision of this Court in *Basheshar Lal v. Natha Singh* dealing with the right of appeal where an order to file an award has been given under Section 526, Civil Procedure Code. As far as this Court is concerned therefore we are unable to follow the Allahabad rulings in *Katik Ram v. Babu Lal* and *Basant Lal v. Kunji Lal*, and we hold that in this case an appeal does lie. The appeal is accepted and the case remanded to the Court of the learned Divisional Judge under Section 562, Civil Procedure Code, for decision upon the merits. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal allowed.

(1) S. C., 112 P. L. R., 1901.

(2) S. C., 1 Digest 1902.

FULL BENCH.

APPELLATE SIDE.

No. 18.

CIVIL.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Chatterji, C. I. E.
and Mr. Justice Robertson.*

ABDULLA,—(PLAINTIFF),—APPELLANT,

versus

ALLAH DAD, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1131 OF 1904.

*Punjab Tenancy Act (XVI of 1887), Section 59—Landlord and
Tenant—Occupancy rights. Alienation of—Right of reversioner to object—
Custom—Burden of proof.*

When a collateral seeks to restrain an alienation of any occupancy right by an occupancy tenant, proof that such a power of restriction exists in respect of proprietary rights would be relevant.

When such a suit is brought, the initial *onus* lies on the plaintiff, but when he has proved first, that he is entitled to succeed to occupancy right on the death of the occupancy tenant, and second that had the subject-matter in question been a proprietary right instead of a right of occupancy, he could have maintained the suit, the *onus* will be shifted and it will be upon the person who asserts that no such custom obtains as to occupancy rights to prove that contention.

*Further appeal from the decree of W. Chevis, Esquire, Divisional Judge,
Rawalpindi Division, dated 23rd March, 1904.*

Mr. Roshan Lal, Advocate, for Appellant.

Mr. Bodh Raj, Advocate, for Respondents.

JUDGMENT.

RATTIGAN, J.—(7th July, 1906.)—The question in this case is whether the onus was on plaintiff to prove that he had by custom the right to contest the alienation of occupancy rights made by his father, or whether it was on defendant to prove that by custom plaintiff had no such right.

The decisions of this Court upon the point are conflicting, (see *Faiz Baksh v. Ditta* (115 P. R., 1901 ⁽¹⁾) and *Hari Chand v. Dhera* (12 P. R., 1904) and we accordingly refer the question to a Full Bench for determination.

(1) S. C., 115 P. L. R., 1901.

JUDGMENT OF FULL BENCH.

ROBERTSON, J.—(29th November, 1906.)—This case has been referred to a Full Bench in consequence of an apparent conflict between the decisions in *Faiz Bakhsh and others v. Ditta and others* (115 P. R., 1901 (1)) and in *Hari Chand and others v. Dhera and others* (12 P. R., 1904). There is, however, it appears to us, no substantial disagreement. It was laid down in *Karam Din v. Sharaf Din* (89 P. R., 1898, F. B.), that in considering whether collaterals had the right to restrain an alienation of an occupancy right, evidence that such a restriction could be applied were the subject matter a proprietary right instead of a right of occupancy would be relevant.

In *Faiz Bakhsh's* case it was pointed out that occupancy rights are acquired in such a multitude of different ways, and are enjoyed by such a variety of classes that it could not be said correctly *ab initio* that the collaterals of an occupancy right-holder must be presumed to have a right to restrain an alienation of such a holding.

In *Hari Chand's* case it was laid down as follows :—

“In our opinion, therefore, if plaintiffs have shown that by the custom the parties follow, proprietary rights cannot be gifted, the onus lies on defendants to show that by custom occupancy rights can be gifted.”

Briefly the conclusions which we draw from *Karam Din v. Sharaf Din* (89 P. R., 1898, F. B.), *Faiz Bakhsh v. Ditta* (115 P. R., 1901 (1)), and *Hari Chand v. Dhera* (12 P. R., 1904,) are :—

When a collateral seeks to restrain an alienation of any occupancy right by an occupancy tenant, proof that such a power of restriction exists in respect of proprietary rights would be relevant.

When such a suit is brought, the initial onus lies on the plaintiff, but when he has proved first, that he is entitled to succeed to occupancy right on the death of the occupancy tenant; and, second that had the subject matter in question been a proprietary right instead of a right of occupancy he could have maintained the suit, the onus will be upon the person, who asserts that no such custom obtains as to occupancy rights to prove that contention.

With these remarks, we remand the appeal for decision by the Division Bench.

(1) S. C., 115 P. L. R., 1901.

APPELLATE SIDE.

No. 19.

CIVIL.

Before Mr. Justice Reid.

BAHADUR,—(PLAINTIFF),—APPELLANT,

versus

ALIA, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1259 OF 1906.

Punjab Pre-emption Act (II of 1905). Retrospective effect of—

Held, that the Punjab Pre-emption Act has retrospective effect. Section 2 (3) of the Act specifically deals with vested rights and has deprived parties of the rights to pre-empt as stated therein.

Further appeal from the decree of Qazi Muhammad Adam, Divisional Judge, Ferozepur Division, dated 15th March 1906.

Mr. Shah Nawaz, Advocate, for Appellant.

Mr. Beechey, Advocate, for Respondents.

JUDGMENT.

REID, J.—(19th January 1907).—The first question for decision is whether the Punjab Pre-emption Act, II of 1905, which came into force in May 1905, deprived the plaintiff-appellant of the right of pre-emption in respect of a mortgage by conditional sale of agricultural land.

Section 5 of the Act provides that the right arises in respect of agricultural land only in the case of sales, and in respect of other immovable property in the case of sales or of foreclosures of the right to redeem such property; and Section 2 (3) provides that notwithstanding anything to the contrary in Section 4 of the Punjab General Clauses Act, 1895, the Act shall apply to every claim to the right of pre-emption, whether that right accrued before or after its commencement, save and except any such right in respect of which payment, tender or deposit has been made, or a suit has been brought under any provision repealed by the Act. This suit, instituted on the 4th November 1905, is for possession by pre-emption of 56 kanals 3 marlas of land, being a portion of 228 kanals 19 marlas, with share of *shamilat*, mortgaged by conditional sale; the year of grace, after notice of foreclosure, having expired on the 20th September 1900. *Attar Singh v. Ralla Ram* (13 P. R., 1901(1), F. B.), is authority for holding that the suit was within limitation under Article 120 of the Act. *Sahib Din v. Rahmat* (90 P. R., 1904(2), F. B.), has been cited for the proposition that the Pre-emption Act cannot cancel or destroy a pre-existing cause of action. The authority does not help the appellant, as at page 311 of the report it is specifically stated that the Court had to decide "whether there was anything in the Punjab

(1) A.C., 12 P. L. R., 1901 (F. B.)

(2) A.C., 88 P. L. R., 1901 (F. B.)

Limitation Act which clearly and unmistakably indicated that that Act was to have retrospective as well as prospective effect," and that it was clearly open to the Legislature to give retrospective effect to enactments and to take away vested rights.

Section 2 (3) of the Act specifically deals with vested rights, and has deprived the appellant of the right to pre-emption in respect of the foreclosure.

NOTE.—The rest of the judgment is not material for the purposes of this report.

APPELLATE SIDE.

No. 20.

CIVIL.

Before Mr. Justice Reid.

SHARFO, AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

versus

RAMZAN, AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE NO. 1361 OF 1905.

Custom—Succession—Khanadamad's khanadamad—Gujars of Gujrat District.

Held, that among *Gujars* of Gujrat District custom does not allow a *khanadamad* to appoint his own *khanadamad* as heir entitled to inherit ancestral property which the first *khanadamad* had got from his appointer.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jhelum Division, dated 22nd August 1905.

Mr. Nanak Chand, Advocate, for Appellants.

Mr. Fazal-i-Husain, Advocate, for Respondents.

JUDGMENT.

RAJ, J.—(26th November 1906).—The sole question for consideration is whether among *Gujars* of the Gujrat District, the son-in-law of a *khanadamad* may be appointed *khanadamad* and heir to the ancestral estate left by the appointer of the first *khanadamad*.

The authorities cited are *Kamman v. Nuthu*(1); *Muhammad v. Musammat Umar Bibi*(2); *Nawab v. Wallan*(3), Civil Appeal No. 444 of 1905; *Chiragh Bibi v. Hassan*(4); Roe and Rattigan's Customary Law, pages 61 and 65; and the answer to Question 18 at page iv of the Customary Law of the Gujrat District. As held in *Muhammad v. Umar Bibi*(2), that answer has been incorrectly recorded by the Settlement Officer in the printed volume, and runs as follows: "If the *aulad dukhtari* have, during their lifetime, married a daughter and kept her in their house with her husband as *gharjawatra* and supported them, and by a written deed or by a verbal gift placed them in possession, then that daughter and her *aulad* will be *malik*."

(1) 96 P.R., 1892. (2) 129 P.R., 1893. (3) 91 P.R., 1906, s.c., 106 P.L.R., 1907, (4) 19 P.R., 1906; s.c., 70 P.L.R., 1906.

In *Kamman's* case it was held that gifts to daughters whose husbands are *khanadams* are allowed by *Gujars* and *Muhammadan Jats* of the Gujrat District.

In *Muhammad's* case it was held that among *Muhammadan Jats* of Gujrat a daughter to whom a gift of ancestral property had been made could not give it to her daughter or the husband of that daughter. It does not appear clearly from the report that the husband of the first donee was a *khanadam*, but the arguments used in the judgment imply that he was.

Civil Appeal No. 441 of 1895 was decided solely on the basis of assent by the reversioners, though it was stated that the daughter of a *khanadam* and her husband were persons whose possession might naturally be assented to.

In *Chiragh Bibi v. Hassan* it was held that among tribes who do not usually recognise daughters as heirs, the word '*aulad*' does not include females.

Nawab v. Wallan, dealt with the custom governing *Chachars* of the Shahpur District, and specifically distinguished them from the Gujrat tribes dealt with in *Muhammad's* case.

The passages in *Roe* and *Rattigan's Customary Law* cited lay down the general rule that married daughters who succeed do so, not as ordinary male heirs, but as the means of passing on the property to another male, whose descent from his mother's father in the female line is allowed under special circumstances to count as if it were descent in the male line; and that if there is no son the land will revert, except in special instances, where the daughter's husband is allowed to hold for his life, to the agnates of the daughter's father.

The *dicta* at page 504 of the report of *Muhammad's* cases relied on for the defendant-appellants do not help them. The *dicta* runs as follows:—"Daughters, when they are allowed to succeed rarely, if ever, succeed absolutely. They are merely recognised as transmitting a title to their possible male children, that is, their father's grand-children. When the latter survive and succeed, they are naturally in the same position as if they had succeeded through the male line and may do whatever their maternal grandfather or any other *sahib-i-paidad* might have done."

This cannot be interpreted as authority for holding that the daughter can transmit the estate to her daughter, even where that daughter and her husband have remained in the house of the daughter and *khanadam*, i. e., the house of the last male owner, whose estate is in suit.

The authorities are, in my opinion, in favour of the decree of the lower Appellate Court, and I answer the question stated at the beginning of this judgment in the negative and dismiss the appeal with costs.

Appeal dismissed.

REVISION SEDE.

No. 21.

CIVIL.

Before Mr. Justice Johnstone.

BISHAMBAR DAS, AND OTHERS,—PETITIONERS,

versus

UDHO RAM, AND OTHERS,—RESPONDENTS.

CASE No. 198 OF 1905.

Civil Procedure Code (Act XIV of 1882), Sections 311, 312 and 588 (16) —Execution of decree—Sale—Application to set aside sale dismissed in default—Second application rejected—Order passed on second application not appealable.

The property of a minor judgment-debtor was sold in execution of a decree. His application to set aside sale filed after it was confirmed was dismissed in default. Then he applied (a) that the dismissed application be restored; or (b) that his present application be treated as a fresh application to set aside the sale or (c) that this be treated as an application for review. The prayers were not granted and the application was dismissed. On appeal against the order dismissing the second application, the District Judge set aside the sale.

Held, that no appeal having been made against the order confirming the sale and the orders on the two applications not being appealable, the District Judge had acted without jurisdiction.

Petition for revision of the order of Khan Bahadur Sheikh Khuda Bakhsh, District Judge, Gurdaspur, dated 19th October 1904.

Rai Sahib Lala Sukh Dial, Pleader, for Petitioners.

Mr. Gulim Ram, Advocate, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(22nd October 1906).—In this case an application was made on 8th November 1902 by Sipahi Mal, decree-holder, for attachment of house property belonging to his judgment-debtor, Abdul Rahim, minor. The decree was a small one, and it was ruled by the Court that the property named was of unnecessarily high value, and therefore one house was attached, which was proclaimed and put up to auction and bought by Bishambar Das, petitioner, on 13th May 1904. On 16th May the decree-holder offered Rs. 250 by application, and on 31st May one Kanhaya offered Rs. 300. The sale came on for confirmation on 15th June 1904, decree-holder withdrawing his offer, and it was confirmed under Section 312, Civil Procedure Code, in the absence of objection under Section 311. Next day objections were put in on behalf of the minor who asked for re-sale. This application was

dismissed for default on 30th June 1904. On 1st July 1904 application was made on behalf of the judgment-debtor asking (a) that the dismissed application be restored; or (b) that this be treated as a fresh application to set aside the sale; or (c) that this be treated as an application for review. The execution Court on 9th August 1904 rejected the application, and the judgment-debtor appealed against this rejection to the District Judge, who ruled that the second application aforesaid could have been considered to be an application for review of the order passed on the first application; that the proclamation of sale was irregular; that loss has been caused to the judgment-debtor; and that an appeal lay under Section 588 (16) read with Section 312, Civil Procedure Code. The learned District Judge then allowed the appeal, set aside the sale, accepted an offer of Rs. 302 from the decree-holder, without apparently referring to the auction-purchaser at all, and sanctioned sale accordingly.

The auction-purchaser applies here for revision, and I feel constrained to allow the petition, much as I would like to see the minor judgment-debtor get a good price for the property. In the first place, the District Judge's action in setting aside the sale and then proceeding to sell the property to decree-holder without fresh proclamation was wholly illegal. In the next place, I can find no indication that the proclamation of the sale was irregular. But the most important point after all is that no appeal lay to the District Judge against either the order of 30th June, or that of 9th August 1904. These orders were not passed under Section 312, Civil Procedure Code. The only order under that section was passed on 15th June 1904, confirming the sale. Against that order no doubt an appeal lay to the District Judge, but no such appeal has been preferred. The applications of 16th June 1904 and 1st July 1904 were not applications under Section 311, Civil Procedure Code, at all, as they both follow the order of confirmation of sale. They could at best have been taken as applications for review of the aforesaid order of confirmation. The District Judge seems to think that he was authorized to interfere on the appellate side, because the second application might have been treated as a petition for review of the order on the first application; but this is clearly wrong, as no appeal lies against an order refusing to review.

For these reasons, I hold that the District Judge has acted without jurisdiction, and I allow this petition and set aside the District Judge's final order and proceeding generally, and restore the order of the *Munsif*. Respondent will pay petitioner's costs.

Petition allowed.

APPELLATE SIDE.

No. 22.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Rattigan.

FAZAL, AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

versus

HAYAT ALI, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1394 OF 1905.

Custom—Alienation by sonless proprietor—Gift—Khana-damad—Daughter's son—Khinger Jats of Chakwal Tahsil, of Jhelum District.

Held, that among *Khinger Jats* of *Chakwal Tahsil*, of *Jhelum District*, a sonless male proprietor is competent by custom to make gifts of ancestral property in favour of his *khunadamad* and daughter's son and his near collaterals have no right to object.

Further appeal from the decree of Captain B. O. Roe, Additional Divisional Judge, Jhelum Division, dated 21st October 1905.

Mr. Nanak Chand, Advocate, for Appellants.

Lala Dhanpat Rai, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J.—(6th December 1906).—The material facts are sufficiently given in the judgments of the lower Court and do not require detailed recapitulation.

The parties are *Khinger Jats* of the *Chakwal Tahsil*, of the *Jhelum District*. The *Khingers* are a section of a larger tribe of *Jats*, viz., the *Bhattu*. From the genealogical trees given in the judgments of both the Courts below, it appears that plaintiffs are the own nephews of *Baz*, deceased, and are entitled to one-third of the estate left by him by right of inheritance. The plaintiffs have a third brother, *Karam Din*, who, as well as the descendants of another brother of *Baz*, have not sued. It is said this is a sort of test case, and the claim of the other relations will depend on the result of the present suit. But *Bahadur*, one of them, fully supported the alienation by *Baz*, in the Court of first instance.

The defendant, *Hayat Ali*, is the sister's son of *Baz*, and it was admitted by the plaintiff, before the commissioner for local enquiry, appointed after the remand by the Divisional Judge, that he was also *khana-damad* of the deceased, though the daughter of *Baz* is now dead. Appellants' counsel stated in this Court that she died before the gift in 1892, but this was denied by the respondents, and there is no evidence in support of appellants' assertion. The other donee is the son of that daughter. The property in suit is ancestral. The question then is, whether *Baz* could gift the bulk of his ancestral land to his sister's son and *khunadamad*, or to his daughter's son; for, if the gift to either could be lawfully made by custom, it must be maintained as a whole.

The case was first decided after taking the evidence of the parties. The Divisional Judge was not satisfied with the enquiry made and returned the case for more. The parties then elected to go upon the evidence already adduced, but the first Court appointed a commissioner accepted by both parties to make a local investigation. The commissioner's finding on the point of custom was in favour of the ~~donee~~ defendants, and apparently no specific objection was taken to the report by the plaintiffs. The lower Courts have concurred with the commissioner's opinion, as regards the custom. Council for plaintiffs-appellants represents that the enquiry is still incomplete, and that his clients ought to be granted a further opportunity to produce all their evidence. We cannot accede to this prayer under the circumstances of this case, for the plaintiffs had ample opportunity to produce their proofs at the original trial, and again when the case was remanded expressly for further inquiry. On the latter occasion they stated that they would not call any further evidence. And they produced what evidence they thought proper before the local commissioner. They did not ask in the first Court to be allowed to adduce further proof when the commissioner made his report, nor in the Court of the Divisional Judge. We hold that they cannot claim a fresh inquiry at this stage.

We have thus to decide the case on the existing record. The plaintiffs quote page 8 of Mr. Talbot's General Code of Tribal Customs in the Jhelum District and the presumption arising therefrom, and rely on the fact that the parties are agriculturists and the land ancestral. The lower Courts have relied on *Sher Jung v. Ghulam Mohi-ud din* (22 P.R., 1904^[1]) and *Hasan v. Jahana* (71 P.R., 1904^[2]) on the questions of *onus*, but a somewhat different view is taken in *Bholi v. Faqir* (62 P.R., 1906^[3]). We do not think it necessary to say anything positive here on the question of *onus*, as there is evidence on the record on which the case can, and should, be disposed of.

After giving due weight to Mr. Talbot's record of customs, we are unable to hold that the concurrent views of the first Court after remand and of Divisional Judge supported as they are by the report of the local commissioner, are erroneous. The locality being west Punjab, and the parties Muhammadans, we may reasonably expect some relaxation of the strictness of the rule of agnatic succession in favour of daughters and their issue, and a less restricted power of alienation in favour of the latter. There are numerous decisions of this Court upholding such alienations among agricultural tribes of the same district which have a distinct bearing on the point before us, e. g., *Sher Jung v. Ghulam Muhi-ud-din*

(1) a.c., 40 P.L.R., 1904. [2] a.c., 26 P.L.R., 1904. [3] a.c., 108 P.L.R., 1906,

(22 P. R., 1904⁽¹⁾) in which, after an elaborate discussion of the evidence in the case and the rulings of this Court, it was held that among *Mari Rajputs* of the Chakwal *Tahsil* a gift of half of the ancestral estate to a daughter's son in the presence of agnates is valid, and at page 92 of the record the opinion was expressed that the power of gift in favour of a daughter's son is one very commonly exercised among the Muhammadan tribes of the Jhelum District..... In *Hassan v. Jahana* (71 P. R., 1904⁽²⁾) it was found that among *Moghals* of the *Phipra* *got* in the Chakwal and Pind Dadan Khan *Tahsils* plenary power of gift in favour of relations in the female line exists without the consent of male agnates. A similar power of gift in favour of a *khanadamad*, to the prejudice of male collaterals, was found among *Janjuahs* of the Jhelum District in *Fazal v. Khan Muhammad* (85 P. R., 1904⁽³⁾). In *Nur Hussain v. Ali Sher* (83 P. R., 1905⁽⁴⁾), it was held that among *Gujirs* of the same district the owner had power to prefer some near male relations to others of equal degree on account of services rendered by the former. It must be borne in mind that one of the donees here is a *khanadamad*, and it is proved that he rendered services to the donor. We think these cases show that the power of alienation in favour of the female line or for services is common among these tribes. The instances mentioned by the defendants, though not exactly on all fours with the present alienation, if they are critically examined, nevertheless show that alienations to daughter's issue, etc., are frequent in this very tribe, while the plaintiffs have not been able to cite a single instance in restriction of the power. This shows, we think, that the statements in the records of custom recently made should be received with caution, as the value of land having greatly risen in these times, the *zamindars* are naturally seeking to curb the power of alienation. Doubtless if the whole community accepts this view, and it is acted on without demur for some time, it may be good evidence in support of the custom stated, but the change of opinion cannot effect old alienations in any case, and the general consent to the abrogation of the old rule requires to be clearly proved. The replies of the tribesmen of Jhelum on gifts to daughters are dubious and by no means unanimous,—*vide* answers to questions 86—89. We find here that the gift made so far back as 1892 has been challenged by the plaintiffs only now, and that even at the present moment the bulk of the relations equally entitled hang back, and one of them has expressly declared himself in favour of the power to gift. We have already observed that there are considerable equities in favour of Hayat Ali, the *khanadamad*, who was brought from another village and who served the deceased and his widow all his life.

On the whole, therefore, we see no reason to think that the question of custom has been wrongly decided by the lower Courts. We accordingly dismiss this appeal with costs.

Appeal dismissed.

[1] s.c., 40 P. L. R., 1904.

[2] s.c., 96 P. L. R., 1904.

[1] s.c., 173 F. L. R., 1905.

[4] s.c., 88 P. L. R., 1905.

APPELLATE SIDE.

No. 23.

CIVIL.

*Before Mr. Justice Lal Chand.***KARAM CHAND AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,***versus***KHUDA BAKHSH,—(DEFENDANT),—RESPONDENT.**

CASE No. 704 OF 1904.

Civil Procedure Code (Act XIV of 1882), Section 244—Execution of decree—Restitution—Fresh suit—Plaint treated as application for execution of decree.

In execution of a decree for possession of equity of redemption by right of pre-emption, the mortgaged property was delivered to the decree-holder by mistake. The judgment-debtors had redeemed the mortgage before the decree was passed. They as mortgagees now sued the decree-holder for actual possession and were met by the plea that the suit was barred by Section 244 of the Civil Procedure Code.

Held, that the plea had no force, and that even if it were valid, the plaint could be treated as an application under Section 244 of the Civil Procedure Code for restitution of property illegally delivered to the decree-holder.

Further appeal from the decree of Cup'tain B. O. Roe, Additional Divisional Judge, Rawalpindi Division, dated 22nd April 1904.

Rai Sahib Lala Sukh Dial, Pleader, for Appellants.

Mr. Muhammad Shafi, Advocate, for Respondents.

JUDGMENT.

LAL CHAND, J.—(30th July 1906).—The execution file shows clearly that the defendant-respondent obtained possession of the lands in suit by executing his decree for pre-emption. The decree was merely for delivery of possession of equity of redemption in property now in suit, and neither the application for execution, nor the warrant for delivery of possession, issued by the executing Court, ever intended that the decree-holder should obtain possession of anything beyond the equity of redemption decreed in his favour. But by a mistake or oversight on the part of the *Putwari*, who delivered possession, defendant-respondent was delivered possession of the lands in suit instead of the equity of redemption. The plaintiffs who had redeemed these lands from prior mortgagees, previous to defendant's suit for pre-emption of equity of redemption, now sue for possession as mortgagees, on the ground that the defendant-respondent has taken unlawful possession in execution proceedings. The first Court decreed the claim, but the lower Appellate Court has dismissed it on the ground that the suit is barred under

Section 244, Civil Procedure Code, observing, at the same time, that the defendant-respondent had no business to obtain possession in execution of his decree.

I am unable to agree with the lower Appellate Court that the suit is barred under Section 244, Civil Procedure Code. The two authorities quoted, viz., *Arundadhi v. Natesha* ⁽¹⁾ and *Kuriyali v. Mayan* ⁽²⁾ are not applicable, and they were not pressed on my attention in argument by the counsel for respondent. He, however, referred to a large number of cases, viz., *Shurut Soondurce Dabee v. Puresh Narain Roy* ⁽³⁾, *Jogendro Narain Koonwar v. Ranees Surus Moyee* ⁽⁴⁾, *Appa Rao v. Venkataramanayamma* ⁽⁵⁾, *Viraraghada v. Venkata* ⁽⁶⁾, *Arundadhi v. Natesha* ⁽¹⁾, *Rahiman Khan v. Pateba Miyah* ⁽⁷⁾, *Raghunath Ganesh v. Mulva Amad* ⁽⁸⁾, *Mohibullah v. Imami* ⁽⁹⁾, *Beg Raj Marwari v. Sreemuthy Kundali Debya* ⁽¹⁰⁾, *Sri Narain v. Daulat Ram* ⁽¹¹⁾, *Choudri Gumukh Singh v. Mussammat Mirza Nur* ⁽¹²⁾, and *Kalu Khan v. Abdul Latif* ⁽¹³⁾ none of which seems to me to cover the present case. The plaintiffs have not sued as judgment-debtors of the pre-emption cases. They were then sued as vendees of the equity of redemption, and a decree was passed against them as such. Their present suit is based on the ground that they are mortgagees of the land in suit, having redeemed it from the prior mortgagee, and that as such they are entitled to hold possession until duly redeemed. The dispute, therefore, is not between a decree-holder and a judgment-debtor, but between an owner and mortgagee of the property, and such dispute in no sense relates to execution, discharge or satisfaction of the decree. It is a dispute with which the decree in the pre-emption suit had and has no concern.

Possession was doubtless obtained by the defendant-respondent by executing his decree, but in order to apply Section 244, it is further necessary to show that it is a question between the parties to the suit in which the decree was passed and relates to execution discharge or satisfaction of the decree. The parties are nominally the same, but at least one of them, the plaintiff, occupies a totally different character, and the dispute in no way relates to execution of the decree beyond

[1] I. L. R., V Mad., 391.

[2] I. L. R., VII Mad., 255.

[3] 12 W. R., 85.

[4] 14 W. R., 39.

[5] I. L. R., XXIII Mad., 55.

[6] I. L. R., XVI Mad., 287.

[7] I. L. R., IV Mad., 285.

[8] I. L. R., XII Bom., 440.

[9] I. L. R., IX All., 220.

[10] 8 Cal., W. N., 353.

[11] 9 P. R., 1890.

[12] 63 P. R., 1901; sc. 101 P. L. R. 1901.

[13] 45 P. R., 1901; sc. 113 P. L. R., 1904.

the accomplished fact that possession was delivered to respondent by the *Patwari* contrary to the express orders of the Court executing the decree. No authority was quoted exactly applicable to such circumstances. In *Shurut Soonduree Dabee v. Puresh Narain Roy* ⁽¹⁾ the actual facts are not given and the case was remanded for enquiry. In *Jogendro Narain Koonwar v. Ramesh Surus Mayee* ⁽²⁾ it was held, that "however absurd might be the order of the Court which directed the thing to be delivered, still, unless jurisdiction were given, no other Court would have the power to alter the direction in question." Referring to *Rash Beharee Lal v. Bebee Wajun* ⁽³⁾ quoted in argument to the contrary, it was explained that "there the learned Judge would seem to have said that the decree-holder had taken something which neither the Court executing the decree nor the decree itself gave him;" and there it was held that for that something a separate suit would lie to recover it. If this is the meaning, and I understand that it is so, of the decision in question, I do not at all dissent from it. It appears to me that the case *Rash Beharee Lal v. Bebee Wajun* ⁽³⁾ is exactly applicable to the circumstances of the present case. The judgment in that case, delivered by Sir Barnes Peacock, Chief Justice, pointed out that if a decree is obtained for delivering a cow and a horse is delivered, that cannot be considered to be an act done in execution of the decree. "It would be doing something wholly different from that which was ordered by the decree." In that particular case the decree merely ordered that an embankment should be lowered to its proper height, and the *Nazir* in addition caused breaches or holes to be cut in the embankment so lowered, because he thought them necessary for the protection of the *bund* from the flow of water over its surface. It was held that this was not done in execution of decree. Similarly, the act of the *Patwari* in the present case, in delivering possession of land, when warrant of Court directed delivering possession of equity of redemption, cannot be called an act done in execution of decree. The case is very much alike to another illustration given in the same judgment, *viz.*, where a decree should order "Rs. 500 to be levied, and instead of levying Rs. 500, the execution Court or the *Nazir* should deliver a *zamindari*." It appears to me that Section 244, Civil Procedure Code, bars a regular suit, where the question relating to execution of a decree is raised *bonâ fide*. But when the decree itself, on the face of it, is wholly irrelevant to the question raised, and the wrong-doer takes the plea of bar to shield his

(1) 12 W. R., 83.

(2) 14 W. R., 39.

(3) 11 W. R., 516.

unlawful gain secured even against the express orders of the executing Court, possibly in collusion with the officer executing the decree, and in the absence of the judgment-debtors, it would seem to me that Section 244 would have no application. In the present case the Divisional Judge has found that the defendant had no business to obtain possession of the land, and there is not even a plausible defence on the merits. The matter is absolutely clear that the defendant could not obtain or retain possession without payment of Rs. 1,079, and the plea of bar under Section 244 was raised on the ground, which is untrue, that the decree awarded actual possession of land. Under the circumstances no *bonâ fide* question relating to execution of decree arises in the case and Section 244, Civil Procedure Code, is no bar to the maintenance of the regular suit.

But farther, even if there were any room for doubt on this point, the plaint may be treated as an application for execution of decree for claiming restitution of lands wrongfully delivered to defendant by the *Patwari* when executing the decree. This course was approved of or adopted in *viz.*, *Biru Mahata v. Shyama Churn Khawas* ⁽¹⁾ *Jhamman Lal v. Kewal Ram* ⁽²⁾ *Pasupathy Ayyar v. Kothanda Rima Ayyar* ⁽³⁾ *Jetindra Mohan Tagore v. Mohamed Basir Chowdhry* ⁽⁴⁾.

The only question for determination under the circumstances would be whether the *Munsiff*, who heard and decided the present suit, was competent to entertain the application for restoration. I have no doubt that he was competent both by reason of transfer of business by the District Judge as well as being the successor in office of the *Munsiff* who executed the decree. There is no conceivable defence against the application for restoration, the mistake made being apparent on the execution file. The plaintiff is, therefore, clearly entitled to claim possession of the lands in suit even by restitution in execution proceedings.

For the foregoing reasons, I accept the appeal, reverse the decree of the lower Appellate Court, and restore the decree passed by the first Court with costs throughout.

Appeal accepted.

(1) I. L. R., XXII Cal., 493.

(2) I. L. R., XXII All., 121.

(3) I. L. R., XXXIII Mad., 64.

(4) I. L. R., XXXII Cal., 122.

APPELLATE SIDE.

No. 24.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

DIAL SINGH,—(DEFENDANT),—APPELLANT,

versus

BAKSHISH SINGH,—(PLAINTIFF),—RESPONDENT.

CASE No. 71 OF 1905.

Custom—Pre-emption—Houses—Katra Ahluwalia of Amritsar City—Shops—Conversion of portion of residential house into a godown.

Held, that a custom of pre-emption in respect of sales of houses was proved to exist in Katra Ahluwalia of Amritsar City.

Held, also, that the conversion of a part of a residential house into godowns does not alter the nature of property so as to make the custom of pre-emption inapplicable on the sale of the property.

First appeal from the decree of F. Yewdall, Esquire, District Judge, Amritsar, dated 26th October 1904.

Sardar Jhanda Singh, Pleader, for Appellant.

Mr. Muhammad Shaif, Advocate, for Respondent.

JUDGMENT.

LAL CHAND, J.—(28th November 1906).—This is an appeal in a pre-emption suit relating to a building found to be situate in Katra Ahluwalia, a well-known sub-division of the city of Amritsar. It was not contended by the pleader for appellant that the custom of pre-emption by vicinage as regards residential houses does not prevail in Katra Ahluwalia. In fact the contention could not possibly be raised, as the matter is absolutely concluded by the decision in *Ramji Das v. Kalu Mal*, decided by the District Judge of Amritsar on 21st May 1901, where the previous instances bearing on the question are all collected. This case was further followed in *Kashi Mal v. Lachhmi*, decided by the same Court on 11th October 1901. But it was contended for appellant that the property in dispute is not situate in Katra Ahluwalia, and, secondly, that, it is not a residential house but a shop. As regards the first contention, it was argued that the property is situate in Katra Hara Singh. This contention is, however, entirely unsupported by any evidence on the record. It is opposed to the defendant's own sale-deed, wherein the property is described as situate in Katra Mai Sevan, and it is contradicted by the evidence afforded by the city maps and house registers prepared in 1859 and 1883. We see no reason whatever for discrediting these maps and registers, and therefore have no hesitation in holding that

the property in dispute is correctly found to be situate in *Katra Ahluwalia*.

As regards the nature of the property, we also concur with the District Judge that it must be classed as a house. The District Judge came to this conclusion after an inspection of the locality, and he has correctly summarised the effect of the evidence adduced in the case, as borne out by the following description given by him :—"The street which leads from the corner of the building is residential in its nature. The building itself is too clearly in its construction a house. The ground floor consists of a *deorhi* and a large room which, some two or three years ago, was turned into four shops, which, however, at present appear rather to be used as godowns. The next floor has a *dalan*, with three or four *Kothris*, and the third floor is a *baradari*. The large room below appears to have for many years been used as a store-room for various shop-keepers, but the rest has been lived in. Twenty years ago it was occupied as a residence by Lorinda Mal, and his family who had been there seven years. Since then it is not clear that it has been occupied by a family man." Moreover, in the several deeds executed at various times relating to this property, it has uniformly been described as a *haveli*, excepting in one instance where the lower part is described as consisting of four shops. Thus in the sale-deed, dated the 23rd February 1881, the building is described as a *haveli* 2½ stories high. Similar description is contained in the award, dated 4th January 1886, and in the mortgage-deed, dated 9th May 1901. But in the subsequent mortgage-deed, dated 3rd August 1902, only ten months prior to the sale in question, the property is described as a *haveli* 2½ stories high, having under it four shops. It is therefore clear, as found by the District Judge, that the shops have only recently been constructed, excepting one which was used as his warehouse by an opium contractor, but further there is no evidence that the rooms on the ground floor which have recently been converted into shops are actually used for business as shops. These are still being used as warehouses as is evident from the evidence of defendant's own witnesses; and under the circumstances it is not permissible to hold that any portion of the property has unmistakably been converted into a different class of property, so as to let in the application of a different rule of pre-emption by custom. As observed in *Mussammatt Nur Jahan v. Aziz-ud Din* (108 P. R., 1895), "before a particular property can be held not to be governed by a rule of pre-emption, which is applicable generally to other properties in its

"neighbourhood, on the ground of its distinctive character, such character must be well-marked and recognised. Proof that the custom of pre-emption applies to residential houses is not sufficient to show that it extends to shops in a bazar; but the occupier of a dwelling house does not necessarily convert it into a shop or a cluster of shops so as to make the rule of pre-emption inapplicable by carrying on business in it for a time." Similarly in *Naukul Kishore v. Amir Khan* (122 P. R., 1896), the properties were not held to have lost their character as residential houses when the principal use to which the properties were put seemed to be that of residence, though business might be the object of such residence. In the present case there are no indications on the record that the rooms ostensibly converted into shops were actually used as shops; and therefore the property in suit must still be classed as a house as originally built and hitherto used. It is not sufficient to change the character of the building as a residential quarter; that for some time past it has been occupied only by casual tenants; or that portions have been used as godowns by persons who held their business shops elsewhere. We, therefore, hold that the property in suit is situate in *Katra Ahluwalia*, and is primarily a residential house; and as such subject to custom of pre-emption by vicinage found to prevail in the sub-division. We accordingly uphold the decree of the lower Court decreeing plaintiff's claim, and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 25.

CIVIL.

Before Mr. Justice Rattigan.

NIHAL CHAND,—(PLAINTIFF),—APPELLANT,

versus

ALI BAKHSH, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 168 OF 1905.

Cause of action—Assignment—Chose in action—Right of assignee to sue when transfer is conditional.

The payee of a promissory note, which was not negotiable, mortgaged it with the plaintiff and agreed that the assignment was to continue until all moneys due to the assignee, plaintiff, remained unpaid.

Held, that the plaintiff's suit as assignee to recover the amount due on the pro-note from the maker of it was not maintainable.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 14th November 1904.

Lala Ishwar Das and Rai Bahadur Bakshi Sohan Lal, Pleaders,
for Appellant.

Mr. Beechey, Advocate, for Respondents.

JUDGMENT.

RATTIGAN, J.—(3rd August 1906).—The facts of the case are fully stated in the judgment of the first Court and need not be repeated. The case, briefly stated, is that plaintiff, Nihal Chand, sues on the basis of a pro-note executed by Ali Bakhsh, defendant No. 1, in favour of Nathe Khan, and mortgaged by the latter to plaintiff by three deeds of mortgage.

The translation of the pro-note, as given by the first Court and admitted to be correct, is as follows :—

“ I am indebted to Nathe Khan, son of Kamman Khan, in Rs. 1,700, half of which is Rs. 850. To be paid on demand. Hence this promissory note. 13th October 1900.”

“ (Signed) Ali Bakhsh, *Lambardar*.”

Nathe Khan, according to plaintiff, mortgaged this pro-note with him for Rs. 750, at Rs. 2 per cent. per mensem interest, by three deeds of mortgage : (1) one of 10th September 1901, for Rs. 500 ; (2) a second of 30th September 1901, for Rs. 100 and (3) a third of 19th April 1902, for Rs. 150. According to the terms of these mortgage-deeds, the pro-note was to remain in the possession of plaintiff, who was to have the right of realising the amount from the drawer by suit or otherwise, it being further stipulated that Nathe Khan should have no right to transfer the pro-note to any one else, or to bring any suit upon it, or to enter into any agreement with respect to it with the drawer.

The first Court granted a decree in full to plaintiff, but upon the drawer's appeal, the Divisional Judge, without discussing the merits of the case, dismissed plaintiff's suit on the ground that the pro-note as worded was payable to Nathe Khan only and was, therefore, not a negotiable instrument, as defined in Section 13 of Act XXVI of 1881, and that the rights of Nathe Khan thereunder could not be transferred to plaintiff, who had thus no *locus standi*. Plaintiff has preferred a further appeal to this Court, and on his behalf Mr. Ishwar Das contends that, though the pro-note is not a negotiable instrument, as defined in the Act relating to such instruments, the subject-matter of the mortgages was an auctionable claim ; that as such it could be assigned, and in point of fact was actually assigned to plaintiff in such a manner so as to

enable him to sue in respect of it as effectually as the assignor himself could have sued.

For the respondent, Mr. Beechey did not seriously attempt to support the ground upon which the suit had been dismissed by the lower Appellate Court; his main, if not indeed his sole, contention was that there had been no complete and absolute assignment of the actionable claim, but merely a *charge* (or charges) created in respect of it. He further urged that if in such cases every mortgagee of the debt was competent, to sue in respect of the claim upon which he had been given a charge, the original debtor might be subjected to innumerable suits at the instances of all such persons as had been given such charges. The learned counsel in support of his arguments referred to Section 25 (b) of the English Judicature Act, 1873, and to *Durham Brothers v. Robertson* (L. R., 1 Q. B., (1898), 765). In the case before me, there are, as I have pointed out, three separate and distinct mortgage-deeds dealing with this "actionable claim." These deeds are all in favour of one and the same person, and except as regards the amounts of the mortgage-debts, they are in exactly similar terms. These terms run as follows :—

"Manke Nathe Khan, wald Kammi, Khan, kaum Rajput, sakin
"Mauza Gharkian, Tahsil Batala, ka hun.

"Jo ke ek kita promissory note tadadi rakam rupees 1,700,
"mawarrikha 13th October 1900, nawishta musamma Melir Ali Bakhsh,
"Lambardar, patti Faizpur, mashmula Batala, muqarrar ka yaftni aur
"mil kayat-i-munzhir hai, is lie raqam-i-promissory note-i-mazkur yani
"rupees 1,700 ko bamuqabla mablagh pansad pas Lala Nihal Chand,
"wald Lala Gand Mal Shah, kaum Agarwal, Sakin Batala, ke rahn ba
"kabza karke promissory note hawala Lala mazkur ke kar diya hai,
"aur zar-i-rahn badin tafsil babat karza sulika murtahin se wasul pa lie
"hain, aur sud zar-i-rahn bala ka mablagh do rupae fi sadi mahwari
"dena muqarrar kar liya hai, pas ikrar karta hun aur tahrir kar deta
"hun ke raqam rupees 1,700 mundarja promissory note ke wasul karne
"ka bataur-i-khud ya bazariya nalish ke murtahin mazkur ko akhtiyar
"hai, bad wasul karne raqam mandarja sadar ke murtahin mazkur ko
"awal mablagh zar-i-rahn asl wa sud jis kadar us waqat tak wajib-
"ul-ada ho wasul karne ka akhtiyar hoga, aur jis kadar kharch muqa-
"dama par babat ijra-i-nalish ke kharch hoga woh bhi murtahin is
"raqam se wasul karne ka haq rakhta hai, jis kadar bad mujrai asal
"zar-i-rahn wa sud kharcha, waghaira, ke baqi bachega woh mera haq

“hoga. Main bataur khud murtahin se lunga jab tak ke kul zar-i-rahn
 “wa sud wa kharcha, waghaira, murtahin ko wasul na ho jawe, kul
 “raqam promissory note rupees 1,700 par murtahin kabiz rahega. Muj
 “ko bidun us ki rai ke intiqal karne ya lene ya nalish karne ka aj se
 “koi akhtiyar na hoga. Sirf murtahin se mutabaqa raqam lene ka
 “haq hai, aur jab murtahin-i-mazkur nalish kare muj ko dauran-i-
 “muqadama men masalihat karne ya razinama ya kisi aur tasfiya
 “karne ka koi haq nahin hai, agar koi tanaza babat raqam promissory
 “note ya minjumla raqam-i-mazkur ke paida ho, uski jawabdehi mere
 “ziunme hai, murtahin ka koi wasta nahin hoga, aur murtahin ko asal
 “zar-i-rahn aur sud aur jo kharcha, waghaira, ho mere aur meri digar
 “jaidad manqula wa ghair manqula se har waqat wapis wasul karne ka
 “akhtiyar hai. Mukarrar yih ke murtahin-i-mazkur ka babat raqam-i-
 “promissory note marhuna mazkur ke nalish karne ka misal mere
 “akhtiyar hai ke kul raqam rupees 1,700 mandarja promissory note ki
 “nalish karke wasul kar lewe. Lihaza in chand haruf bataur rahnama
 “baqabza ke likh deta hun ke sanad howe.”

Such then are the terms of the documents under consideration, and the question is whether under these terms there has been such an assignment of the pro.-note, or of the debt of which that pro.-note is the evidence, as would enable the assignee to sue in his own name for the recovery of the debt ?

As above remarked, the pro.-note is clearly not a negotiable instrument, but the learned Divisional Judge was not on that ground alone justified in dismissing the assignee's suit. A debt or other legal chose in action is assignable in this country, no less than in England, and the general principles of law on the subject of such assignment are to be found in Chapter VIII of the Transfer of Property Act, 1882, as amended by Act II of 1900. The Transfer of Property Act is not in terms in force in the Punjab, but the law on the subject under consideration in force in this Province is, speaking generally, to the same effect as that contained in that chapter,—see *Jhoki Ram v. Malik Kadir Bakhsh* 12 P.R., 1894. As laid down in Section 130 (2) of that Act “the transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferer's consent to such suit or proceedings and without making him a party thereto.” Clearly, then, if there has been a good and effectual assignment or transfer of the debt, the assignee or transferee is competent to sue in his own name

for its recovery and none the less so because the pro.-note does not fall within the definition of "negotiable instrument," as given in Section 14 of Act of XXVI of 1881,—see *Kanhaiya Lal v. Domingo, I. L. R., I All.*, 732. Mr. Beechey did not, as I understand, dispute this; his sole contention in support of the decree under appeal was that the so-called assignment was not "absolute" but by "way of charge only," and as such did not entitle the assignee to sue in his own name and without making the assignor a party. Upon this contention two difficult questions arise. Firstly, was the "assignment" an "absolute assignment" within the meaning of Section 26 (6) of the Judicature Act of 1873, or was it conditional or merely by way of charge? And, secondly, if it was not an absolute assignment but was conditional or "by way of charge only," is the assignee thereby debarred from suing in his own name for recovery of the debt?

Mr. Beechey further contended that the three mortgages in favour of plaintiff constitute three separate and distinct assignments of part only of the debt, and as such does not amount to such an assignment as would give the assignee the right to sue.—*Durham Brothers v. Robertson*, ubi supra; *Hughes v. Pump House Hotel Company, L. R., 2 Q. B. (1902) 195*. In my opinion this is not the proper construction to put upon the transactions between the mortgagor and mortgagee. There was in point of fact but one assignment, and this was effected by the first mortgage-deed, under the terms of which the mortgagor assigned the entire debt (viz., Rs. 1,700) to the assignee, and expressly agreed to make no further assignment or alienation of that debt. But under the terms of the said mortgage-deed, the mortgagee, when he recovered the amount of the debt from the debtor, was entitled to pay himself thereout only the principal and interest due under that deed. When, however, subsequent advances were made to the mortgagor, this part of the agreement between the parties was so far modified that the mortgagee was given the further right to retain from the monies recovered by him such an amount as would cover the principal and interest due not only under the first but also under the subsequent mortgages. But this is, I think, perfectly consistent with the theory that by the first mortgage-deed the whole debt, and not merely a part of it, was assigned to the mortgagee. In terms, it certainly was, and I think that such was obviously the intention of the parties.

To revert now to the question whether the assignment was absolute or "by way of charge only."

There is, and can be, no question that an assignment may be "absolute," though by way of mortgage,—see *Burlinson v. Hall* 53 L.J., Q. B. 222. *Tancred v. Delagoa Bay and E. Africa Railway Company*; L. R., 23 Q. B. D. 239, *Hughes v. Pump House Hotel Company*, ubi supra, per Cozens Hardy, L. J.) And if on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of accounts between the assignor and the assignee (per Cozens Hardy, L. J.), in *Hughes v. Pump House Hotel Company*, ubi supra.

But the assignment must be *absolute* in order to be effectual for the purposes of Section 26 (6) of the English Judicature Act; and a conditional assignment—that is, an assignment until the happening of an uncertain event—is not within that section. Thus an assignment of the assignor's interest in a certain sum due from a third party *until certain advances made by the assignee to the assignor had been paid off with interest*, is a "conditional assignment" and does not come within the purview of Section 26 (6) of the Judicature Act (*Durham Brothers v. Robertson*). In this case, Chitty, L. J., remarked: "The present repayment of the money advanced is an uncertain event and makes the assignment conditional. When the Act applies, it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of accounts between the mortgagor and the mortgagee. The legal right transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent upon the performance of a condition; the only method within the provision of the Act for reverting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form; it is one of substance, relating to the protection of the original debtor and placing him in an assured position."

In the mortgage-deeds before me the provisions, with one important exception, are such that the assignment might well be held to be "absolute," but this exception is fatal to any such construction. The

words I refer to are these : “ *Jablak zar-i-rahn wa sud wa kharcha, waghaira, murtahin ko wasul na hojaye, kul raqam promissory note rupees 1,700 par murtahin kabiz rahaga ; mujh ko bidun us ki rai ke intiqal karna ya lena ya nalish karne ka aj se koi ihtiyar na hoga.* ” This clause clearly is on all fours with that which the Court of Appeal in the case last cited held to constitute a merely conditional assignment, for here, as there, the assignment is to continue only until all monies due to the assignee remain unpaid. Following that authority, I hold, therefore, that the assignment in this case was not such as would in England entitle the assignee to rely upon Section 25 (6) of the Judicature Act as enabling him to sue in his own name for the recovery of the debt. The next question is whether an assignment by way of charge or a conditional assignment should in this Province be regarded as giving the assignee the right to sue in his own name ? I do not think it should. As pointed out by Justice Chitty, the difference between an absolute assignment and a conditional assignment is not a mere technicality ; it is one which most materially affects the position of the debtor. When an absolute assignment is made, the debtor receives notice of the assignment and he is entitled and bound thereafter to regard the assignee as the sole person to whom the debt is payable. And he is entitled to take up his position until he receives notice that the debt has been reconveyed to the assignor. But if the assignment is to last only until such time as the money due to the assignee from the assignor is not paid, and is to terminate *ipso facto* upon payment of such money, the debtor, in order to protect himself, would necessarily, from time to time, have to examine the accounts between the assignor and the assignee. This would be a most irksome burden to put upon the debtor, and I do not think that we should be justified in imposing it on him. The rule, as laid down in the 25th section of the Judicature Act, appears, if I may say so, to accord with convenience and with equity, and if in the Province, where there is no express statute law on the subject, the assignment of a debt is to be recognised as conferring upon the assignor the right to sue in his own name for recovery thereof, the Courts should, I think, in fairness to the debtor, insist that the assignment in question be absolute and not merely conditional. Before the enactment of the Judicature Act, a *chose in action*, was not assignable at law, and “ in equity the assignee of a debt, even when the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing

“ at law, and also to allow him to dispute the assignment if he thought “ fit ” [Chitty, L. J., *ubi supra*]. There is thus no equitable reason why an assignee should be permitted to sue the debtor in his own name for the recovery of the debt ; and if we are to recognise, as I think we should, the rule in the Judicature Act, by which assignees were given rights which they did not previously possess, either at law or in equity, we should, in my opinion, adopt that rule in its entirety, especially in a matter which is of such vital concern to the debtor. The rule is one in consonance with justice, equity and good conscience ; and it should, therefore, be followed ; but if it is to be applied it should be strictly applied, for it is only by such strict application that the interest of all parties can be effectively safe-guarded. In Shepherd and Brown’s Commentary on the Transfer of Property Act (5th edition, page 438), it is said that “ a charge which is excluded under that Act (*i.e.*, “ the Judicature Act) must apparently be regarded as a transfer within the meaning of the present chapter.” However this may be, so far as Chapter VIII of the Transfer of Property Act is concerned, I, not being bound by the provisions of that Act, do not feel justified in regarding a charge or a conditional assignment as such an assignment as gives the assignee all the rights which under the Judicature Act he can have only when the assignment is of an absolute character, that is, when it absolutely vests the property in him. Neither the Judicature Act nor the Transfer of Property Act is in terms in force in this Province, and I am, therefore, at liberty to adopt such provisions of the one or the other as it appears to me to be consonant with the general principle of law and equity, and in this particular I have no hesitation in accepting for my guidance the rule enunciated in the English statute.

I hold, therefore, that the assignment of the debt to plaintiff was merely conditional, and that he is in consequence not entitled to sue for recovery of the debt in his own name. I must, accordingly, dismiss the appeal with costs, as plaintiff’s suit was rightly dismissed as against Ali Bakhsh.

Appeal dismissed.

REFERENCE SIDE.

No. 26.

CIVIL.

*Before Mr. Justice Johnstone & Mr. Justice Shah Din.*FAKIRIA, AND OTHERS,—(DEFENDANTS),—APPELLANTS,
versus

DHANI NATH,—(PLAINTIFF),—RESPONDENT.

CASE No. 70 OF 1906.

Punjab Tenancy Act (XVI of 1887), Sections 77 (3) (d) and 100—Jurisdiction of Civil and Revenue Courts—Suit for compensation for branches of trees cut by defendant—Allegations in plaint.

It is settled law that ordinarily the question of jurisdiction is determined by the plaint and the allegations of plaintiff, and the pleas of defendant are immaterial.

The plaintiff sued for compensation for value of branches of a tree cut by the defendants. The defendants pleaded that as occupancy tenants they were entitled to cut the branches. The *Munsiff* found the plea of the defendants not established. On appeal the District Judge made a reference to the Chief Court for the decree in the case to be registered as a decree of the Revenue Court.

Held, that the suit not being cognizable by the Revenue Court, the decree could not be registered as a decree of the Revenue Court.

Case referred by Lala Kesho Das, District Judge, Jullundur, on 31st August 1906.

Pandit Sheo Narain, Pleader, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(12th December 1906).—In this case plaintiff sued defendants in the Court of the *Munsiff* of Phillour for Rs. 5, the value of the branches of a tree cut and removed by defendants. Plaintiff's case was that the land on which the tree stood was his and the tree his, and that defendants had no concern with either. Defendants pleaded that they were occupancy tenants of the land on which the tree stood and so were entitled to take the aforesaid branches. The *Munsiff* drew up an issue: Are the defendants occupancy tenants of the land, and on what ground? And after a long discussion of it held that defendants had not proved it. He also found that defendants had not proved that they were owners of the tree by virtue of having planted it.

An appeal having been presented by defendants in the Court of the District Judge, that officer makes a reference to this Court under Section 100, Punjab Tenancy Act, asking that the decree of the

Munsiff may be registered as that of an Assistant Collector of the 1st Grade at Jullundur, and giving his reasons at length; and this reference has been sent to a Division Bench by Kattigan, J., before whom it was first laid. The learned Judge expressed the view that defendants' plea, stated above, could not properly be gone into by a Civil Court (in view of Section 77 (3) (d), Punjab Tenancy Act), that at the same time that plea could hardly be ignored, as was done in *Ghanaya v. Basan Mal* (96 P. R., 1894), and *Asa Nand v. Kura* (11 P. R., 1895), and that thus the suit should be held as one triable only by a Revenue Court.

After hearing *Lala Shiv Narain* for plaintiff, and giving the matter our best consideration, we are unable to hold that the suit is one for a Revenue Court. The important words in Section 77 (3) of the Tenancy Act are:—

"The following suits shall be instituted in and heard and determined by Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted:—

"(d) Suits by a tenant to establish a claim to a right of occupancy."

With this we must read Section 100 (1) (a) of the Act which sets forth thus the circumstances in which a Civil Court shall refer the question of jurisdiction to this Court; that is to say—

"100 (1) In either of the following cases, namely:—

"(a) If it appears to a Civil Court that a Court under its control
 "has determined a suit of class mentioned in Section 77,
 "which, under the provisions of that section, should have
 "been heard and determined by a Revenue Court."

It is settled law that ordinarily indeed, virtually always, the jurisdiction is determined by the pleadings and the allegations of plaintiff, and that in this connection the pleas of the defendants are immaterial. Here plaintiff's case, as put by him is clearly of civil nature—taken by themselves, his allegations can be brought within no clause of Section 77 of the Tenancy Act. Thus the suit, as laid, is not a revenue suit. But it is suggested that the words in clause (3) of the section, which we have underlined above, prevent the Civil Court from taking cognizance of the claim of defendants to occupancy rights, and so the suit must go to a Revenue Court for trial. In our opinion this is unsound. We agree that the occupancy rights' question cannot properly be heard and determined by a Civil Court, but in our opinion the result of this

is not that the fundamental rule stated above as to the materials a Court should look at in determining the question of jurisdiction should be departed from, but that the Civil Court should simply ignore the plea which under the law it cannot take cognizance of; and the wording of Section 100 (1) (a) quoted above confirms this view, inasmuch as it does not contemplate transfer of a decree from a Civil Court to a Revenue Court unless the *suit* itself was one that should, under Section 77, have been heard and determined by the latter kind of Court. We are also supported in our view by the two rulings noted above.

No doubt the result at first sight is somewhat anomalous, for it is this that defendants' sole plea is ruled out and plaintiff (presumably) must succeed, while defendants are left to sue in a Revenue Court separately for establishment of their alleged *status*. Whether, having succeeded there, they could by any process get the decree in the Civil suit cancelled or not, or could recover from plaintiff any sums paid by them under that decree is not for us to say. Nor need we say whether the proper course for the Civil Court in a case like this is to keep the suit pending until the Revenue Court has decided the question of occupancy rights. Whether defendants have a remedy or not, is not for us to decide here. Even if they have not, the *circumstance* cannot affect the question of jurisdiction now before us.

For these reasons we must decline to pass the order suggested by the learned District Judge. He should hear the appeal according to law, bearing in mind that defendants' plea as to occupancy rights must be ignored. Papers returned.

APPELLATE SIDE.

No. 27.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Lal Chait.

UMRA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

GHULAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 122 OF 1905.

Limitation Act (XV of 1877), Section 7—Custom—Alienation by sonless proprietor—Right of after-born reversioner to object.

Though a reversioner born after an alienation has been made is under certain conditions competent to contest its validity yet he can only do so if the period of limitation had not expired before the date of his birth and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim extension of time under section 7 of the Limitation Act.

Further appeal from the decrees of T. J. Kennedy, Esquire, Divisional Judge, Amballa Division, dated 28th April, 1903.

Mr. Harris, Advocate, for Appellants.

Mr. Miran Baksh, Advocate, for Respondents.

RATTIGAN, J.—(9th June, 1906).—By deed of gift, executed on the 5th November 1881 and duly registered a few days afterwards, one Lalla donated part of his ancestral estate to *Mussammât* Chaubri, the daughter of his deceased brother, Saida. On the 10th August 1883 the donor had mutation of names in respect of the said property, as also of the rest of his estate, effected in favour of the donee, and at the time of mutation he stated that the whole of the property had actually been gifted by him to *Mussummat* Chaubri two years previously.

Ghulam, the father of plaintiffs and nephew of Lalla, was alive at the time both of the execution of the deed of gift and of mutation, and, it may be added, at the time also of the institution of the present suit, but he made no attempt to challenge the validity of the alienations in

favour of *Mussamat* Chaubri who remained in undisturbed possession of the said property until her death shortly before suit.

Plaintiffs, who are the grand-nephews of Lalla, have now sued for a declaratory decree to the effect that the said gifts in favour of *Mussamat* Chaubri were invalid by custom; and shall not affect the reversionary rights after the deaths of Lalla and Ghulam. They claim that their suit is within time by virtue of the provisions of Section 7 of the Limitation Act, three of them being still minors and the fourth having attained his majority within three years of suit. The Court of first instance dismissed the claim on the grounds (1) that plaintiffs, having been born after the dates of the alienations, had no *locus standi*; (2) that the suit was barred by Limitation owing to their father, Ghulam's omission to sue within the period of limitation, and (3) that the gifts were valid by the custom of the tribe to which the parties belong.

The Divisional Judge on appeal upheld the decree of the first Court, but on rather different grounds. He agreed with the Munsiff that plaintiffs had no *locus standi*, they not having been in existence at the date of the gifts, but the main ground on which he dismissed their appeal was that "though their father's failure to sue did not deprive the sons of their right to sue, yet limitation began to run against their father from the date of possession by the donee in the first place, and afterwards when the gift was mutated, from the date of mutation, and as the minors were not alone entitled to bring the suit, and their interest could have been protected by their father, limitation is not saved for them by the operations of Section 7 of the Limitation Act."

Plaintiffs have preferred a further appeal to this Court and we have heard a good deal of argument on various points. We do not, however, consider it necessary to decide whether Ghulam's acquiescence in the alienations is or is not binding on his sons, or whether the gifts were valid by custom, as we are clearly of opinion that the suit is time-barred.

The cause of action in respect of the right to impeach the gift by Lalla accrued, as regards the first gift, in 1881, and as regards the second gift, in 1883, and time began to run from those dates respectively. Time having thus begun to run, the subsequent birth of a rever-

sioner would not stop it (Section 9 of the Limitation Act) and see *Jivraj Ghulab Chand v. Babaji Apa Khadake* (I. L. R., XXIX Bom., 68) and *Sookh Moyee Chowdhraie v. Raghubendro Narain Chowdhry* 24 W. R., 7. A reversioner born after an alienation has been made is under certain conditions undoubtedly competent to contest its validity, *Jowala v. Hira Singh* (55 P. R., 1903, (1), F. B.) but he can only do so if the period of limitation had not expired before the date of his birth, and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim an extension of time under Section 7 of the Limitation Act. Regarded from this point of view, the present suit, which was not instituted till August 1902, is obviously barred by time.

We accordingly dismiss plaintiffs' appeal with costs.

Appeal dismissed.

(1) s. c., 117 P. L. R., 1903 [F. B.]

APPELLATE SIDE.

No. 28.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Chitty.

FAIZ BAKHSH, AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

JAHAN SHAH, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 1094 OF 1905.

Custom—Alienation by sonless proprietor—Gift in favour of some of grand-nephews in the presence of nephews and other grand-nephews—Mair Rajputs of Chakwal Tahsil.

Held, that among *Mair Rajputs* of the *Chakwal Tahsil* of the *Jhelum District* a childless proprietor is competent to transfer by gift the whole of his estate in favour of some of his grand-nephews in the presence of nephews and other grand-nephews.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jhelum Division, dated 14th August 1905.

Mr. Ganpat Rai, Advocate, for Appellants.

Mr. Nanak Chand, Advocate, for Respondents.

JUDGMENT.

RATTIGAN, J.—(29th May, 1906).—The parties are *Mair Rajputs* of the *Chakwal Tehsil*, *Jhelum District*, and the question involved is whether a childless proprietor is competent to transfer by gift the whole of his estate in favour of two of his grand-nephews in the presence of other nephews and grand-nephews? The case reported as *Niaz Ali v. Ahmad Din* (109 P. R., 1882,) is directly in point, and it was there held (after a remand for full inquiry) that a gift by will in favour of one nephew was valid by the custom of *Mair Rajputs* of this very *Tahsil*. We see no reason to doubt the correctness of this decision which was referred to with approval in *Sher Jung v. Ghulam Mohe-ud-din* (22 P. R., 1904 (1)) and upon its authority (reading it with the ruling of the Full Bench in *Mussammatt Bano v. Fateh Khan* (48 P. R., 1903(2), F. B.)) we hold that the gift to *Jahan Shah* and *Karm Shah* was valid and the plaintiffs' suit was, therefore, rightly dismissed. *Mr. Ganpat Rai* urged that an opportunity should be given to plaintiffs to produce further evidence in support of their case, but we do not think that any good and sufficient reason has been given for further protracting this litigation.

(1) S. C., 40 P. L. R. 1904. (2) S. C., 111 P. L. R. 1903, (F. B.)

The parties had ample opportunity of producing evidence in connection with the third issue, and if plaintiffs' evidence upon the question of custom is weak, its weakness is presumably due to the fact that custom is against them. That this presumption is justifiable is apparent not only from the finding in *Niaz Ali v. Ahmed Din* (109 F. R., 1882), but also from the fact that 5 out of 8 reversioners have not joined plaintiffs in this suit.

We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 29.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

RAM CHAND, AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

THAKAR DAS, AND ANOTHER—(DEFENDANTS),—RESPONDENTS.

CASE No. 816 OF 1906.

Custom—Adoption—Wife's brother's son—Brahmins of Dialpur village, Kasur Tahsil, Lahore District—Right of collaterals in eighth degree to contest—Burden of proof.

Held, that the Brahmins of Dialpur village, Kasur Tahsil, Lahore District, are governed by agricultural custom and not by Hindu Law.

Held, also, that it was not proved that adoption of wife's brother's son was valid by custom among them.

Held, further, that collaterals in the eighth degree were competent to contest such adoption.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Lahore Division, dated 11th December, 1905.

Rai Sahib Lala Sukh Dial, Pleader, for Appellants.

Lala Tirath Ram, Pleader, for Respondents.

JUDGMENT.

CLARK, C. J.—(22nd March, 1907).—This was a suit between Brahmins of Dialpur, Tahsil Kasur, Lahore District, to set aside an adoption of a wife's brother's son by a sonless proprietor.

This Brahman family settled in the village some 200 years ago with the founder, 100 *bighas* having been given as *Sankalp* by the *Jat* founder to the common ancestor of the parties, Lakhmi Das. The adopter, Thakar Das, represents half the family and owns some 50

bighas, and plaintiffs are some of the other half of the family, and own their share of the other 50 *bighas*. Thakar Das was in the eighth degree from the common ancestor, counting both Thakar Das and the common ancestor. The land owned by Thakar Das was certainly ancestral property with reference to plaintiffs.

The first question for decision is whether the parties follow custom or Hindu Law.

Plaintiffs put forward custom and defendants Hindu Law.

Defendants rely upon *Moti Ram v. Sant Ram* (103 P. R., 1902) a case of Brahmans of Manhala, said to be only a few miles from Dialpur. The Brahmans there held land, but were not full proprietors, had no share of the *shamilat* and depended largely for their support on contributions from their *jajmans*, and had not settled with the founders; they were held to follow Hindu Law.

In this case the parties cultivate land, and plaintiffs also keep a shop and receive *virt*, but they are full proprietors in the village with share of *shamilat* and were settled with the founder. They were also parties to the *wajib-ul-arz* and agreed to the same conditions, as the *Jats* as to the alienation of lands, and as to the non-succession of daughters.

The adoption is really the appointment of an heir and similar to the alienation of land, and I hold that in matters of adoption the parties follow custom and not Hindu Law.

The next question is whether plaintiffs being in the eighth degree from the adopter can challenge the adoption. Following *Khazan Singh v. Relu* (85 P. R., 1906⁽¹⁾); I hold that it was for defendants to prove that they cannot challenge the alienation, and they have failed to do this.

Natha Singh v. Mohan Singh (93 P. R., 1906) is quoted against this view, but that judgment was based on the special facts of that case and does not go counter to the general principle laid down in *Khazan Singh's* case.

The next question then is whether the adoption of a wife's brother's son is invalid by custom of *jats* (and consequently Brahmans) of this village.

Here also the question of *onus* has been argued at length. For defendants *Kartar Singh v. Mathra Singh* (94 P. R., 1898) is relied upon. This was a case of Sikh *Khatris* of Rawalpindi. The parties did not

(1) s. c., 163 P. L. R., 1906.

belong to an agricultural community, and as according to the personal law of the parties, Hindu Law, the adoption of a wife's brother's son was valid, it was held that the *onus* of proving its invalidity by custom lay upon the challenger of the adoption. Also *Girdhari Lal v. Dalla Mal* (3 P.R., 1901⁽¹⁾). This was a case of *Dhawan Khatri* of Ferozepur, the adopted child was a wife's sister's son. It was held that presumably the parties followed custom, but not the custom of agricultural tribes, and that this custom was not shown to differ in essential particulars from Hindu Law and the *factum*, and the validity of the adoption was held proved.

This case is distinguished from both these cases by the fact that the Brahmins in this case, as I have shown above, have closely associated themselves with the *jat* proprietors of the village in which they live and in some matters at least have adopted their customs.

An adoption of this kind is so unusual and so at variance with the agnatic rule of inheritance that I think the *onus* of proving its validity lay on defendants (*vide Nur Muhammad v. Alimullah*, 75 P. R., 1892) and they have failed to discharge it.

I, therefore, accept the appeal and set aside the orders of both Courts and decree declaring that the adoption of Atma Ram by Thakar Das is nul and void as against plaintiffs' reversionary rights with costs throughout.

Appeal accepted.

REVISION SIDE.

No. 30.

CIVIL.

Before Mr. Justice Lal Chand.

BARU MAL, AND ANOTHER,—(PLAINTIFFS),—PETITIONERS.

versus

MUNIR KHAN, AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 102 OF 1904.

Civil Procedure Code (Act XIV of 1882), Section 491—Attachment before judgment of immoveable property by Small Cause Court—Claim for compensation for improper attachment—Small cause.

The Small Cause Court is prohibited not only from ordering attachment of immoveable property but also from determining the question of compensation in case an attachment is ordered by mistake.

(1) S. C., P. L. R., 1900, p. 297.

Petition for revision of the order of Lieutenant-Colonel C. J. Roberts, Judge, Cantonment Small Cause Court, Sialkot, dated 8th October, 1903.

Rai Sahib Lala Sukh Dial, Pleader, for Petitioners.

Khawaja Kamal-ud-Din, Pleader, for Respondents.

JUDGMENT.

LAL CHAND, J.—(3rd November, 1906).—The only point for decision in this case is whether the order allowing compensation under Section 491, Civil Procedure Code, is a valid order. The suit was tried by a Small Cause Court which under Schedule 2 of the Civil Procedure Code had no power to order attachment of immoveable property before judgment. It is therefore not a case of compensation for improper attachment provided for by Section 491, but for an attachment which the Court had no jurisdiction or power to order. By Schedule 2 of the Civil Procedure Code, Chapter XXXIV, relating to arrest and attachment before judgment is extended to the Provincial Courts of Small Causes except as regards immoveable property. The exception in my opinion prohibits the Small Cause Court not only from ordering attachment of immoveable property but also from determining the question of compensation in case an attachment is ordered by mistake. It would otherwise be anomalous to hold that the Court had no jurisdiction to order attachment of immoveable property but could award compensation for such attachment if made erroneously. The lower Court therefore had no power to allow compensation under Section 491, Civil Procedure Code, and its order so far was *ultra vires*. I accept the application for revision and set aside the order awarding compensation under Section 491, Civil Procedure Code, but without costs.

Petition accepted.

APPELLATE SIDE.

No. 31.

CIVIL.

Before Mr. Justice Rattigan.

GURDITTA,—(DEFENDANT),—APPELLANT,

versus

JAI SINGH,—(PLAINTIFF),—RESPONDENT.

CASE No. 814 of 1905.

Custom—Succession—Sister's grandson—Thakar Rajputs in Dada Siba Jagir, Kangra District.

Held, that the defendant, on whom the onus lay, had failed to prove that among Thakar Rajputs in Dada Siba Jagir Kangra District a sister's grandson was

entitled to succeed to the ancestral property of his maternal uncle as against the *ala malik jagirdar*.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 7th April 1905.

Rai Bahadur Bakhshi Sohan Lal, Pleader for Appellant.

Rai Sahib Lala Sukh Dial, Pleader for Respondent.

JUDGMENT.

RATTIGAN, J.—(20th March, 1907.)—A return has now been made to my order of the 17th November, 1906 which should be read as part of this judgment. Upon the evidence given on the remand proceedings, the Munsif is of opinion that a sister's son is entitled by custom prevailing among *Thakar Rajputs*, in Dada Siba *Jagir*, Kangra District, to inherit his maternal uncle's property in preference to the *Jagirdar ala malik*. The Divisional Judge, on the contrary, holds that no such custom has been proved, and after hearing the learned pleaders for the parties I agree with him. There may, no doubt, be cases in the Punjab where, in the absence of collaterals, a sister's son or grandson is regarded as an heir. But this is apparently not the case in the Kangra District, for in that district even a daughter's son is looked upon as a total stranger so far as succession to ancestral landed property is concerned (see "Tribal Law," page 140). According to the *Wajib-ul-arz* the *ala malik* is entitled to succeed if the deceased proprietor has left him surviving no persons whom custom regards as heirs, and to a like effect is the decision of this Court in *Surjan v. Lulu* 175 P. R., 1888. The question then in this case is whether by the custom of the parties a sister's grandson is regarded as an heir in the absence of agnates. The general rule undoubtedly is that custom does not regard a sister or her issue in the line of heirs—(para 24 of the Digest of Customary Law). There may be exceptional cases but the *onus* of proving that a sister's issue comes within the category of heirs rests upon the persons so alleging. In the present case as the Divisional Judge points out there is really no evidence in support of this allegation, and the oral evidence adduced by appellants on the remand is unsupported by any documentary proof and is of no value. Had the alleged instances really occurred it would have been easy to corroborate the oral evidence by entries in the mutation registers.

I am accordingly of opinion that no ground has been shown why I should reverse the original finding of the Divisional Judge who is an

officer of great experience in this district, and I, therefore, reject this appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 32.

CIVIL.

Before Mr. Justice Johnstone.

SAIDA AND OTHERS,—(PLAINTIFFS),—PETITIONERS,

versus

ISMAIL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 354 OF 1905.

Punjab Tenancy Act (XVI of 1887), Section 59—Landlord and Tenant—Occupancy rights—Custom—Succession—Collaterals—Sonless adopted son's associated brother.

On the death of an adopted son the brothers of his adoptive father succeed to occupancy rights originally held by their common ancestor and inherited by the adopted son from his adoptive father, and natural brothers and nephews of the adopted son associated by him in cultivation have no right to succeed.

Petition for revision of the order of T. J. Kennedy Esqr., Divisional Judge, Ambala Division, dated 19th October, 1904.

Mr. Muhammad Shafi, Advocate for Petitioners.

Mr. Fazal-i-Ilahi, Advocate for Respondents.

JUDGMENT.

JOHNSTONE, J.—(28th March, 1906).—This petition has been admitted on the point of law raised. As the questions of fact are clear and hardly disputed, this means admitted as regards the whole dispute. The learned Divisional Judge, agreeing with the first Court in his final conclusion, dismissed the plaintiffs' appeal with costs.

There is no doubt that the occupancy rights in suit were held by Nur, father of plaintiff Saida and father's father of plaintiff Alia. Nur had a third son, Pira, who adopted one Abdul Rahim as far back as September 1878 and made a gift of his occupancy rights to him. Pira died not long afterwards. Abdul Rahim formally associated the defendants with himself in the tenancy as far back as 1882, and they had been holding along with him as far back as 1880. On these facts the first Court held that plaintiffs have no subsisting right to succeed to the tenancy in preference to defendants upon the recent death of *Mussammatt Jiwani*, widow of Abdul Rahim, who succeeded to her husband when he died in February 1892.

The learned Divisional Judge treated the association of defendants with himself by Abdul Rahim as a *gift*, and held that only the landlord could object to such a gift, and it must be presumed that he has not objected. He relied upon *Nihala v. Ishar Singh* (68 P. R., 1894). Defendants are Abdul Rahim's brothers and nephews, and Divisional Judge says they succeeded to him by survivorship.

Before me a certified copy has been put in of the judgment of this Court in Civil Appeal No. 936 of 1905, decided on 28th June, 1906. That was a suit between the landlords and these very defendants for the land, and the final decision was that the landlords had by lapse of time and acquiescence lost their right to object to what happened in 1880-82.

The way I look at the case is this. Plaintiffs cannot and do not now impugn the gift to Abdul Rahim or his adoption: those acts are now safe from attack owing to lapse of time. Thus, Abdul Rahim undoubtedly became occupancy tenant: and naturally, under Section 59 (1) (b), Punjab Tenancy Act, his widow succeeded him. But they say that they can impugn the association of defendants in the tenancy under customary law and they assert that here there is no time bar against them inasmuch as they could not sue for *possession* until the death of the widow and at the same time were not bound to sue for a declaration. It is quite clear that apart from the act of Abdul Rahim of 1880-82 defendants could have no rights whatever as they do not come under clause (c) of sub-section (1) of the aforesaid Section 59. Plaintiffs also contend that they and not defendants are the *heirs* of Abdul Rahim. In my opinion these contentions are sound and in accordance with the authorities.

Taking the last contention first I would refer to such rulings as *Karm Din v. Sharaf Din* (89 P. R., 1898, F. B.), *Puran Chand v. Mahadeo and others* (69 P. R., 1900) and *Hari Chand v. Dhera* (12 P. R., 1904). From these rulings I gather that, while in cases of contest between a landlord and others regarding succession to or alienation of a tenancy, Section 53 and Section 59, "Punjab Tenancy Act," 1887 must be regarded, on the other hand, in cases of conflict between occupancy tenants and those who would be their natural heirs under custom or between persons claiming succession to an occupancy tenancy, the holder of which has died, and alienees of the occupancy rights, the same rule of custom should presumably be followed as regulate alienation of and succession to land held in ownership. I would also refer to *Mohen v. Mutsaddi* (109 P. R., 1894) under which, where A is joint occupancy tenant with B and C is A's natural heir according to the custom of the

tribe of A, and A dies, B does not succeed in preference to C by survivorship, but C succeeds in preference to B by virtue of custom. Upon these authorities the contention of plaintiffs that they, and not defendants, are the heirs to Abdul Rahim is clearly sound.

For the other contention of plaintiffs no authorities are needed at this time of day. I can find no article of the Limitation Act, 1877, Schedule II, which bars their claim to possession of the tenancy in despite of the happening of 1880-82. Plaintiff's right is to succeed to Abdul Rahim on the death of himself and his widow. If he is treated as an adopted son then under custom and Section 52 (2), Tenancy Act, his heirs, he being sonless, are his adoptive father's nearest male agnates if descended from the original holder of the land; and if he is treated as a donee then equally under custom the gift, upon failure of his male line, reverts to the heirs of the donor.

The Divisional Judge's mistake was that he failed to see the qualifications of Section 53 and Section 59, "Tenancy Act," explained in the rulings of 1894, 1898, 1900 and 1904 quoted above.

For these reasons I would find for plaintiffs, and accepting the petition and reversing the finding and decree of the learned Divisional Judge, I would direct that plaintiffs' claim be decreed in full with costs throughout.

Petition accepted.

REVISION SIDE.

No. 33.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

JIWANI,—(PLAINTIFF),—PETITIONER,

versus

BHAGEL SINGH,—(DEFENDANT),—RESPONDENT.

CASE No. 2183 OF 1904.

Civil Procedure Code (Act XIV of 1882), Sections 103 and 647—Dismissal for default—Application for revision dismissed for default—Application for re-hearing—Sufficient cause—Absence of counsel owing to unusual combination of circumstances.

An application for revision by a *parda-nashin* lady was dismissed in default of appearance of both the counsel engaged by her for the case on the date fixed for the hearing. An application for re-hearing of the case was made on the ground that the counsel were prevented from appearing by an unusual combination of circumstances. It was objected that the application did not lie, and that there

was no sufficient cause for non-appearance of the party at the hearing of the case.

Held, overruling the contentions, that application lay by virtue of Sections 103 and 647 of the Civil Procedure Code and that there was sufficient cause for re-hearing of the application for revision.—75 P. R., 1881, *dissented from*.

Application for re-admission of the application for revision dismissed in default by the Chief Court on 15th May, 1906.

Bhagat Ishar Das, Pleader, for Petitioner.

Lala Dhanpat Rai, Pleader, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(22nd April, 1907).—On 15th May, 1906 a Judge of this Court dismissed this revision petition for default. On 12th June the petitioner applied for restoration of the petition to the file and, in the alternative, for admission of the application as a fresh revision petition. This application has been referred to a Division Bench, and we have heard arguments.

The first question is whether an application for restoration can be entertained at all, and in connection therewith we have been referred to the following authorities. *Courts of Wards v. Fateh Singh* (75 P. R., 1881), *Umar Din v. Ala Bakhsh* (54 P. R., 1901⁽¹⁾, F. B.), *Coates v. Kashi Ram* (76 P. R., 1903⁽²⁾), *Keshori Mohan Seth v. Gul Muhammad Shah* (I. L. R., XV Cal., 177), and *Rura Mal v. Kuria* (62 P. R., 1894). We have also read Section 102, Section 556, and Section 647 of the Civil Procedure Code.

Mr. Dhanpat Rai relies mainly on the Punjab rulings in *Court of Wards v. Fateh Singh* (15 P. R., 1881) and *Umar Din v. Ala Bakhsh* (54 P. R., 1901⁽¹⁾, F. B.). The first is in terms directly in favour; but the decision on the point there is stated in a single sentence without discussion, and the Bench allowed the petition to be taken as a second petition on the merits. At that time the stamp on a revision petition and the stamp on an application for restoration to file were the same, and therefore the question was one of little practical importance, and so we see that the ruling is by no means a valuable authority. In *Umar Din's* case the immediate point for decision was different and the case of *Court of Wards* was merely incidentally cited with approval again without any formal discussion of the point now before us and without any formal reiteration of the *dictum* upon which Mr. Dhanpat Rai relies.

(1) S. C., 45 P. L. R., 1901 (F. B.)

(2) S. C. 170 P. L. R., 1903.

The ruling *Rura Mal v. Kuria* dealt with a matter of execution. An objection petition under Section 278, Civil Procedure Code, had been dismissed for default, and it was held that no petition for its restoration to the file was admissible, Section 647, Civil Procedure Code, being taken as not extending to execution proceedings. We do not think this any guide here. In connection with execution of decrees, the code contains a long and elaborate chapter of procedure, and it may be right to say that all possibilities in connection with execution can be found there.

We do not think that the Punjab ruling in *Coates v. Kashi Ram* or the Calcutta ruling in *Keshori Mohan Seth* help respondent much. In the latter the learned bench decided the matter of *transfer* of execution proceedings from one Court to another as a pure matter of Bengal practice and not as a matter of Law. Clearly the *dictum* there is no guide to us here. In the Punjab ruling it was laid down that in execution proceedings an applicant cannot avail himself of Section 103, Civil Procedure Code, and thereby get an objection restored which has been dismissed for default: that in absence of prosecution of an objection to attachment, the Court should dismiss in default, that if an objection has been disposed of on the merits, a fresh objection by the same objector cannot be entertained, the objector's remedy being, if any exists, by way of review; and that this Court will not interfere on the revision side if a convenient remedy other than revision exists.

Our view is that, though Section 647, Civil Procedure Code, may not extend to execution proceedings, there is no clear authority that it does not extend to revision proceedings. The *dictum* in *Court of Wards v. Fatteh Singh* is probably unsound, and is, as we have shewn, of little value as an authority. Taking the words of Section 647 [Section 647, Civil Procedure Code.—The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction other than suits and appeals.

EXPLANATION.—This section does not apply to applications for the execution of decrees, which are proceedings in suits.] in their plain meaning, we are unable to see why they should not apply to revision proceedings.

But apart from this there is another way of looking at the matter, even if Section 647 be ignored. Under Section 621, Civil Procedure]

Code, this Court in revising can pass virtually any order it thinks fit, and it can certainly (and probably should, *See Coates v. Kashi Ram* quoted above), dismiss for default in the case of failure to prosecute. The powers, then, in such cases, are something like the powers of an appellate Court—less than those powers in that some matters that can be taken up in appeal cannot be taken up in revision, but quite equal to these powers in dealing with the case within the sometimes restricted limits. Among other things, as we have already stated, the revising Court can dismiss for default, though this is not plainly stated in any section; and in our opinion the power to dismiss for default, in proceedings which in their nature so much approximate to appellate proceedings, naturally connotes the power to restore after default, when the default is satisfactorily explained. If a petitioner has been prevented, by some cause beyond his control, from prosecuting a revision petition under the Punjab Courts Act, he is in no way to blame. It is usually no use to him that the law allows him to present a fresh revision petition, for the time-bar comes in. Even if no time-bar supervenes, he has to pay another *ad valorem* duty, though he has been in no way to blame, and we cannot think that the legislature intended in these ways to penalise innocent defaults.

In our opinion, then, a petition for restoration is competent, and we admit the petition now before us and overrule the respondent's objection.

The next question is whether there was in fact sufficient cause for the default. Here the important facts are that the petitioner is a lady, who, according to the customs of the country can hardly be expected to appear in person in Court, and that she engaged *two* counsel to represent her. Owing to an unusual combination of circumstances neither could appear, and we think it would be harsh and pedantic to rule that the default cannot be condoned in the case of a lady who rather went out of her way to ensure an appearance being put in for her. We hold that there was sufficient excuse for default and we restore the revision petition.

NOTE.—The rest of the judgment is not material to the Report.

APPELLATE SIDE.

No. 34.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

SOHAN SINGH,—(DEFENDANT),—PETITIONER,

versus

JAHANDAD KHAN,—(PLAINTIFF),—RESPONDENT.

CASE No. 188 OF 1906.

*Civil Procedure Code (Act XIV of 1882), Sections 562 and 595—
Remand—Privy Council. Appeal to—*

Held, that no appeal lies to the Privy Council against an order of remand under Section 562 of the Civil Procedure Code, for the order is not a final decree within the meaning of Section 595 of the Code.

Application for leave to appeal to the Privy Council from a decree of the Chief Court of the Punjab, dated 27th February 1906.

Bhagat Ishawar Das, Pleader, for Petitioner.

Mr. M. S. Bhagat, Advocate, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(15th February 1907).—This is an application for leave to appeal to the Privy Council, such an application can only be granted if it falls under one of the clauses of Section 595, Civil Procedure Code. In this case this Court, holding that the Court below had decided the suit on a preliminary point (*viz.*, *locus standi*), reversed the finding on that point as erroneous and passed an order of remand under Section 562, Civil Procedure Code. The “value” here is sufficient to warrant an appeal under clause (a) of Section 595 read with Section 596; and the real question therefore is whether the order passed by us can be said to be a final decree, *see* Section 595, clause (a). Mr. M. S. Bhagat on behalf of plaintiff urges that it is not a final decree. It is certainly a “decree” for the purposes of Chapter XLV of the Code—*see* Section 594; but we hesitate to call it a final decree. It does not dispose of the case, and in *Tetley v. Jai Shanker*, I. L. R., I All., 726, *Habib-un-Nissa v. Munawar-un-Nissa*, I. L. R., XXV All., 629, *Aben Sha Subit Ali v. Cassirao Baba Sahib Holkar*, I. L. R., VI Bombay 260 and *Mahant Ishvargar Budhgar v. Candasama Amar Singh* I. L. R., VIII Bombay, 548, such an order has been treated and spoken of as little more than an interlocutory order. In *Sayid Mazhar Hussain v. Mussammat Bodha Bibi*, I. L. R., XVII All., 112, an appeal

to the Privy Council was allowed against a remand order under Section 562, Civil Procedure Code, but this was because it was found that the order really disposed of the whole case and that the remand should not have been so made. If the final decision is against petitioners in this country they can still, in appealing to the Privy Council, ask that tribunal, to take up the question of *locus standi*, which alone has so far been decided against them. Therefore, we also think that we should not grant a certificate under clause (c) inasmuch as petitioners have in our opinion another remedy much more convenient for all parties, and further because they may succeed in their case on the merits in this country, in which circumstances an appeal now upon our order would be a mere waste of money.

Petition refused with costs.

Petition dismissed.

APPELLATE SIDE.

No. 35.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

HIRA,—(PLAINTIFF),—APPELLANT,

versus

KARAM KAUR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 747 OF 1906.

Custom—Alienation by sonless proprietor—Right of remote collaterals to object—Hindu Bhat Jats of Raya Tahsil of Sialkote District.

Held, that among Hindu Bhats of Raya Tahsil of Sialkote District collaterals in the eighth degree are not entitled to contest an alienation of ancestral property made by a sonless proprietor.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 17th June 1905.

Mr. Shadi Lal, Advocate and Chowdhari Nabi Bakhsh, Pleader, for Appellant.

Mr. Pestonji Dadabhai, Advocate, for Respondents.

SHAH DIN, J.—(2nd January, 1907).—*Mussummat Karam Kaur* widow of the deceased Jhanda, is on the record, and has been duly served with notice of the date of hearing.

Only *Mussummat Budhi*, one of the vendors, has not been served, but she is not a necessary party, and the case can proceed. This judgment will also dispose of the connected Appeal No. 748 of 1906.

The parties are Hindu Bhat *Jats* of *Tahsil* Raya in the Sialkot District. The sole question for decision in this appeal is whether among the tribe to which the parties belong an alienation of ancestral land made by a childless proprietor can be contested by his collaterals who are related to him in the eighth degree according to the method of computation laid down in *Ladhu v. Daulati* (126 P. R., 1890). Both the Courts below have laid upon the defendants (vendees) the *onus* of proving that the plaintiffs, the reversioners of the vendors, had not a *locus standi* to impugn the sales in dispute, and have both arrived at the conclusion that the *onus* has been fully discharged.

The plaintiffs appeal to this Court and on their behalf we have heard the case argued at some length by Mr. Shafi Lal. After giving our very best consideration to the argument of the learned counsel, we are unable to hold that the decision of the lower Appellate Court is erroneous, we have grave doubts whether under the circumstances of this case the *onus* was rightly thrown on the defendants of proving that the plaintiffs, so distantly related to the vendors, had not a *locus standi* to object to the alienations in question, but even if the *onus* is considered to have been correctly placed we think that it has been, upon the materials on the record, amply discharged. The oral evidence in the case is admittedly of no value; and the learned counsel for the appellant contented himself with simply referring to the documentary evidence to which reference has been made by the Divisional Judge with a view mainly to distinguish from the present case the three judicial decisions on which the Divisional Judge relies. The distinctions sought to be drawn between those precedents and this case are not, however, in our opinion of much consequence, and in any case do not serve to show that the said instances are not relevant to the present enquiry.

The first instance relied on by the Divisional Judge relates to this very village, and it is noteworthy that in that case it was the present plaintiff who sued to contest an alienation made by a widow. The Subordinate Judge held on 26th May 1890 that the plaintiffs, who, it seems, were related to the alienor's husband in the 8th, 9th, and 10th degrees, were too remote to have the power to object to the sale in suit, and on appeal this decision was upheld by the Divisional Judge.

The second instance related, it is true, to another village, but it was a village situate in the Raya *Tahsil*. There the plaintiffs were re-

lated to the vendor in the 10th degree. A pretty full enquiry appears to have been made into question of the *locus standi* of the plaintiffs, and as a result the Divisional Judge held in a considered judgment on 16th August 1899, that they were too remote collaterals to be competent to object to the alienation in dispute.

The third instance is one of great importance, as the final decision in that case was given by this Court and is published as *Natha Singh v. Mohan Singh*, 93 P. R., 1906⁽¹⁾. This is the latest decision by this Court relating to the question of the *locus standi* of distant collaterals among *Jats* of Sialkot District to impugn an alienation made by a childless proprietor, and we have no hesitation in following it in this case.

Although there the parties were *Ghuman Jats* of the Sialkot *Tahsil*, that circumstance alone is, we consider, insufficient to distinguish that decision from the present case, especially in view of the fact that *riwaj-i-am* of 1865, a copy of which is upon the present record, would seem to apply to *Bhat Jats* (though not specifically named as a separate tribe) equally with *Ghuman Jats*.

Taking into consideration the above instances in conjunction with the entry in the *riwaj-i-am* of 1868, which from its relevant clauses seems to view with disfavour the remote collaterals' right of objection to a childless proprietor's alienation and considering also the present constitution of this particular village which, as the lower Appellate Court observes, shows unmistakably that the original trivialities of the proprietary body have been very much loosened, we hold, in agreement with the lower Appellate Court, that the plaintiffs have no *locus standi* to contest the sales in dispute. The appeal accordingly fails; and is dismissed with costs.

Appeal dismissed.

[1] s. c., 163 P. L. R., 1906

REVISION SIDE.

No. 36.

CRIMINAL.

Before Sir William Clark, Kt., Chief Judge.

BASANT RAM,—PETITIONER,

versus

KING-EMPEROR,—RESPONDENT.

CASE NO. 573 OF 1907.

Punjab Municipal Act (XX of 1891), Sections 92 and 94—Erection of partition wall over tharra.

Held, that under Section 92 of the Punjab Municipal Act a person must obtain sanction of the Municipality before he can erect a new partition wall over the tharra of his building.

Case reported by H. J. Tollinton, Esquire, Sessions Judge, Lahore Division, on 20th April, 1907.

Mr. Oertel, Advocate, and Lala Hari Chand, Pleader, for Petitioner.

Lala Sangam Lal, Pleader, for Respondent.

REPORT.

The facts of this case are as follows :—

On 1st November, 1906, the petitioner Basant Ram submitted certain plans to the Municipal Committee of Lahore requesting sanction to certain alterations, repairs and additions to his house. A few days after the residents of the *mukalla* wrote protesting that the petitioner had carried out certain alterations in his house without the sanction of the Committee.

The accused on summary conviction by E. R. Anderson, Esquire exercising the powers of a Magistrate of the 1st Class in the Lahore District, was sentenced, by order, dated 19th February, 1907, under Sections 92 and 164 of the Municipal Act to a fine of Rs. 50 or, in default, to one month's simple imprisonment.

The proceedings were forwarded for revision on the following grounds :—

The facts of this case are that on 1st November, 1906 the petitioner submitted certain plans to the Municipal Committee of Lahore requesting sanction to certain alterations, repairs, and additions to his house. The application for sanction contains the following words :—

The places marked A and B are to be newly built : and the yellow colour shows the petty repairs and alterations (*vide* plan on Municipal file).

A few days after the application the residents of the *muhalla* wrote protesting that the petitioner had carried out certain alterations in his house without the sanction of the Committee.

The principal objection urged was against the alleged enclosure of what the *mohalladars* described as a public well.

I may say at once that there is no evidence as far as the present prosecution is concerned, whether the well is public or private. A prosecution was ordered under Section 92 of the Municipal Act (*vide* also the Lahore Building Rules published under notification No. 207, dated the 9th May, 1898).

On a summary trial the petitioner was convicted and sentenced to a fine of Rs. 50 or, in default, to one month's simple imprisonment.

It is admitted by the Magistrate that the new construction marked in the plan as *A* and *B* being a *sabat* or shed on the top of the roof has not been carried out.

Petitioner alleges that this is all he meant to obtain sanction for, though he showed in the plan the petty repairs and alterations for the information of the Committee.

As the *sabat* has admittedly not been constructed, it remains to consider whether the alterations and repairs do amount to re-erection within the meaning of Section 94 of the Municipal Act or not.

The allegations against the petitioner are (1) that he has constructed an additional wall; (2) that he has widened the door of the house; (3) that he has constructed a roof over the balcony; (4) that he has built a *tharra*. As regards (1) Mr. Stubbs, Assistant Engineer, has filed an affidavit with the appeal in which he states that the wall is 2 feet 10 inches deep and has been put up to support an old beam which had sagged. He further alleges that this support adjoins the wall and is on the original foundation. I am of opinion that this support does not come within the purview of Section 94 of the Municipal Act.

As regards (2) the Note to Section 94 in Fenton's Manual states that "*the opening of a new door in wall would not apparently be erecting a building.*"

Much less then would Section 94 apply to the widening of an existing door.

As regards (3) the Magistrate says "there were no indications of a roof having been in existence before."

The Assistant Engineer on the contrary finds that there were distinct indications of an old roof, the zinc roof simply replacing a former *chajja* roof.

With regard to (4) the Assistant Engineer states "the wall indicated as a *tharra* is not new but part of the original building."

I forward the file to the Chief Court under Section 438, Criminal Procedure Code, with the recommendation that the conviction and sentence may be set aside for the following reasons:—

(1) It was largely a question of expert opinion as to how far the building had been altered.

(2) The Magistrate relied too much on his own observations.

(3) Considering the intricacy of the case the Magistrate was wrong in not applying Section 260 (2) of the Criminal Procedure Code.

(4) Taking the affidavit into consideration it would appear that no "erection" or "re-erection" within the meaning of Sections $\frac{92}{94}$ of the Municipal Act has taken place.

JUDGMENT.

CLARK, C J.—(6th June 1907.)—It was on 1st November, 1906 that Basant Ram, applied to the Municipal Committee for sanction (1) to build certain erections; (2) to make certain alterations, repairs and additions, marked yellow on the plan filed by him.

Without waiting for any orders he proceeded to make the alterations; this was found out on 18th November and his application was refused on 29th November, 1906.

He appears therefore to have acted in an arbitrary and high-handed way. One of the additions made by him is admittedly of a new partition wall from the floor to the roof of his *tharra*. This divides off the part of the *tharra* in front of his shop from the part in front of the well, it stops access to the well by the steps formerly used for this purpose. To meet this difficulty Basant Ram built a *tharra* or step in front of the *tharra* in front of the well, intending access to the well to be had in this way. The Municipality, however, have made him remove this *tharra* as erected without sanction.

The question I have to determine is whether this building of this partition wall was erecting a building within the meaning of Section 94 of the Municipal Act. It seems to me to be clearly a material alteration. The affidavit of Mr. Stubbs as regards this wall is irrelevant, it is immaterial whether it was useful to support a sagged beam, the im-

portant point is that it blocks access to the well, and admittedly there was no wall there before and when he says it is on its original foundation, I suppose he means that it is on the existing *tharra*. Though a *tharra* may be a private property, yet the space over the *tharra* really forms part of the street, as far as regards light and ventilation, and a *tharra* could not be enclosed, and a partition wall is only a minor form of enclosure.

The erection of this partition wall was in my opinion an act which involved important interests of the public, and effected a material alteration of Basant Ram's house as far as the public and Municipality were concerned and required sanction of the Committee. The order of the Sessions Judge was *ex parte* without hearing the Municipal Committee, and the affidavit of Mr. Stubbs was subsequent to the decision of the case.

On the admitted facts it seems to me that the building has been materially altered, this does away with an alleged irregularity of the Magistrate.

The revision is dismissed and the order of the Magistrate maintained.

Petition dismissed.

APPELLATE SIDE.

No. 37.

CIVIL.

Before Mr. Justice Rattigan.

FATEH ALI, AND OTHERS,—(DEFENDANTS)—APPELLANTS,
versus

NIZAM DIN,—(PLAINTIFF),—RESPONDENT.

CASE No. 935 OF 1906.

Civil Procedure Code (Act XIV of 1882), Section 32—Parties—Striking off of defendant after first hearing.

Held, that a Court is not competent to strike off the name of a defendant as a party to the suit after the first hearing.

Miscellaneous further appeal from the order of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 27th June, 1906.

Mr. Jalal Din, Advocate, for Appellants.

Mr. Devi Dial, Advocate, for Respondent.

JUDGMENT.

RATTIGAN, J.—(13th March, 1907.)—In a previous suit between the present plaintiffs and the present defendants it was held by the

Revenue authorities that the former were not entitled to occupancy rights, and the latter were granted a decree for possession. Plaintiffs then sued in the Civil Court for a declaration that they were sole occupancy tenants of this land and that defendants Nos. 1-5, had no right whatever thereto. The persons impleaded as defendants Nos. 6 and 7 were admittedly the proprietors of the land.

Defendants pleaded (*inter alia*) that the suit was barred under Section 13, Civil Procedure Code, by reason of the decree given to them by the Revenue authorities and a preliminary issue on this point was struck on the 28th March, 1906.

On the 30th March, the Court finding that the dispute was really only one between plaintiffs and defendants Nos. 1-5, returned the plaint for amendment, with a view to the names of defendants Nos. 6 and 7 being struck out.

The plaint was amended accordingly, and the Court proceeded to decide the preliminary issue. On the 31st May the Court held that the suit was barred under Section 13, Civil Procedure Code, and dismissed plaintiff's suit with costs. This decision was reversed by the Divisional Judge, on the ground that the present suit related to title and concerned persons both of whom claimed to be entitled to occupancy rights, and that as such it was one which the Revenue Courts had no jurisdiction to entertain.

The learned Judge accordingly remanded the case under Section 562, Civil Procedure Code. Defendants Nos. 1 to 5 have appealed to this Court and on their behalf it is contended —

- (a) That the suit as originally brought was clearly one falling under Section 77 (3) (d) of Act XVI of 1887 as the proprietors were parties to the suit ;
- (b) That under Section 53 the first Court had no power to return the plaint for amendment after the first hearing, *Damodar Das v. Gokal Chand*, I. L. R., VII All., 79, F. B., and that consequently the real and only plaint still before the Court is the one originally filed on the 16th January, 1906.

An appeal of course lay under Section 588 (6), Civil Procedure Code, from the order of the first Court returning the plaint for amendment and admittedly no such appeal was lodged. It is contended, however, that the defendants can take this objection at this stage as the whole case is now before me for determination as regards the merits of

the Divisional Judge's order (*Maha Ram v. Ram Mahar* 1 P. R., 1903⁽¹⁾, F. B., *Savitri v. Ramji*, I. L. R., XIV Bom., 232). Upon the amended plaint, the claim is, I think, clearly one cognizable by a Civil Court, for upon that plaint the dispute is between two parties, each asserting themselves to be occupancy tenants; the proprietors of the land no longer appearing on the record as parties. On the other hand, the claim as laid in the *original plaint* falls equally clearly, in my opinion, under Section 77 (d) of the Punjab Tenancy Act, as the suit was then by a person alleging himself to be entitled to occupancy rights as against the defendants of whom, at that time, some at all events were admittedly the landlords. Upon the ruling of the Full Bench, *Maha Ram v. Ram Mahar* 1 P. R., 1903⁽¹⁾, F. B. the present objection can and should be considered in this appeal and the question accordingly is whether the Court of first instance was competent to allow the plaint to be returned for amendment after the first hearing. The decision of the Allahabad Full Bench in *Damodar Das v. Gokal Chand*: I. L. R., VII All., 79, F. B., is unquestionably a direct authority to the contrary, and though in some cases a plaint has been returned for amendment even on appeal (*e. g.*, in *Mussammatt Bibi Hukam Kaur v. Sardar Asa Singh*, (1 P. R., 1900,) the power of the Court to allow such amendment was not considered. In the present case, moreover, the plaint was returned for the purpose of striking out the names of certain defendants who had (in the opinion of the Court) been improperly joined as defendants, and even if the plaint could in other respects have been amended either by the plaintiffs or by the Court itself at any time before judgment the names of these parties could not have been struck out even by the Court after the first hearing (Section 22, first para. Civil Procedure Code). In my opinion therefore the Court of first instance was incompetent to return the plaint for amendment in this particular after the first hearing, and I must accordingly hold that the only plaint before the Court is the one originally filed. This being the case the suit is clearly one falling under Section 77 (3) (d) of Act XVI of 1887 and as such cognizable solely by a Revenue Court. Under these circumstances I must accept the appeal and reversing the order of the Divisional Judge, restore the decree of the first Court dismissing the plaintiffs' suit. Plaintiffs must pay the appellant's costs throughout.

Appeal allowed.

(1) S. C. 1 P. L. R., 1903 (F. B.)

APPELLATE SIDE.

No. 38.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Johnstone.

HAR GOPAL,—(PLAINTIFF),—APPELLANT,

versus

BHAGWAN SAHAI, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 268 OF 1906.

Regulation XVII of 1806, Section 8—Mortgage by way of conditional sale—Condition as to payment of mortgage-money by instalments and mortgage operating as sale in default of payment—"Stipulated period."

Where the mortgagor agrees to pay mortgage-money by instalments, and it is stipulated that in default of payment of any instalment the mortgage shall operate as a sale, the mortgage is not one by way of conditional sale, and the provisions of the Regulation XVII of 1806 are not applicable to it.

A mortgage cannot be foreclosed before the expiry of the full term of the mortgage, when mortgage-money is payable by instalments, and default is made in payment, and it is provided in the mortgage-deed that the mortgage will operate as sale in case of default in payment.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Delhi Division, dated 13th January, 1906.

Mr. Harris, Advocate, for Appellant.

Mr. Morrison, Advocate, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(15th March, 1907.)—This is a case of a peculiar kind. The suit is one for possession by way of foreclosure. The deed was executed by one Nainu on 26th September 1890 and by it the land was mortgaged for Rs. 150. Nainu promised to pay each year Rs. 30 of the principal and the interest for the year and agreed in the deed that on default the land should be deemed sold for the balance due at time of default. Nothing was paid. Mortgagee caused notice to be served on Nainu (so he says) on 5th July 1892 under the Regulation, and his case is that on the expiry of the year of grace (5th July, 1893) he became owner of the property. Nevertheless he did nothing to enforce his alleged rights until 5th July 1905, on which day, one day before the expiry of 12 years, he filed the present suit, Nainu having by then being dead 7 or 8 years. Defendants, Nainu's heirs, pleaded limitation, want of consideration for the mortgage, absence of prior demand as required by the Regulation, and non-service of, and irregularities in,

the notices. The first Court found the suit within time, the notice duly served, prior demand made, the notice quite regular, and consideration proved, and gave plaintiff his decree.

The learned Divisional Judge, found that there was no time bar, but declined to accept the evidence of service of notice. He therefore accepted the appeal of the defendants and dismissed the suit; and now plaintiff appeals.

In our opinion probably the better view is that the notice has not been proved to have been served. This is not one of those cases in which allowance can be made on the score of lapse of time, for defects in the evidence of a party. Here plaintiff himself, in a way that cannot fail to throw great doubt upon the *bona fides* of his case, has waited for years after the death of the original mortgagor before bringing his suit.

The heirs were certainly all minors at the time and two of them are minors even now; and in such circumstances very good evidence indeed is required to prove such a point as service of the notice. The attesting witnesses of the fact of service are alive but have not been called, and plaintiff relies only upon the process-server and a stranger, named Kalu, whose evidence is nearly worthless. Such a witness as he can be procured at any time by such a man as plaintiff.

This is sufficient for the disposal of the case; but, even if we take it for the sake of argument that the notice was duly served and was regular, that prior demand was really made, and that full consideration passed, there is to our mind a fatal obstacle to the suit. In the first place, it is more than doubtful whether the Regulation covers the case at all. If it does not, then plaintiff's cause of action accrued not on expiry of one year after service of notice, but when default occurred, *i. e.*, in 1891; and clearly the suit would be time barred. Again, if the Regulation does apply, then plaintiff should not have had notice issued until after expiry of the "stipulated period" mentioned in the Regulation. In our opinion this phrase means stipulated period for redemption, which, if there is such a period at all, must be at least 5 years after execution of deed, for according to agreement mortgagor was not obliged to pay the last instalment of the debt, and so to redeem, until 5 years had elapsed. Looked at in this way it must be held that the notice was premature and so useless, and the result would be that plaintiff has not yet acquired under the Regulation a good title to ownership of the land.

A few remarks about these two alternatives will be useful. In our opinion *Ilagh Singh and others v. Basawa Singh and others*, 50 P. R., 1906, is sufficient authority for the proposition that the Regulation does not apply to such *bai-bil-wafa* as the present one. There no stipulated period for redemption was to be found in the contract, but there was a condition that, if mortgagor failed for six years to pay interest, the land would be considered sold for the balance of principal and interest. It was ruled that the Regulation did not apply. The case was thus very similar to the present, and we propose to follow it. The consequence, as already stated, is that the suit is time barred.

The authority for the alternative proposition will be found in *Kishori Mohan Roy v. Ganga Bahu Debi*, I. L. R., XXIII Cal., 228 P. C.

If 5 years is to be taken as the term for redemption, then the petition in the present case for issue of foreclosure notice was premature and the proceedings under it useless. Their lordships pointed out that in such cases the right of the mortgagee to petition under Section 8 of the Regulation does not arise until the period stipulated for redemption has expired.

We therefore dismiss this appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 39

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Kensington.

FAZAL DAD KHAN,—(PLAINTIFF),—APPELLANT,

versus

SAWAN SINGH, AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1112 OF 1907.

Custom—Pre-emption—Waiver—Pre-emptor receiving from the vendee mortgage money due to him.

Held. that a pre-emptor cannot be deemed to have waived his right of pre-emption by simply receiving from the vendee mortgage-money due to him on the security of the property subject of the sale.

Further appeal from the decree of the Divisional Judge, Jhelum Division, dated the 10th July, 1907, reversing the order of the Subordinate Judge, 1st Class, Pind Dadan Khan, dated 19th February, 1907.

Mr. Nanak Chand, Advocate for Appellant.

Mr. Gurcharan Singh, Advocate for Respondents.

JUDGMENT.

JOHNSTONE, J.—(9th January 1908).—Fazl Khan had 3 sons, Sultan Khan, (defendant No. 1,) Muhammad Khan, (defendant No. 3) and Mehdi Khan, (not a party to this suit). These persons owned 332 *kanals* of land in *Mauza Pinnawal, Tahsil Pind Dadan Khan*. This land was in mortgage for Rs. 1,700 to Fazl Dad Khan, plaintiff and his brother Sagar Khan, when on 23rd June 1905, defendant No. 1, sold, out of the aforesaid land, one-third of 234 *kanals* 1 *marla*. with share of wells etc., etc. to Sawan Singh, defendant No. 2, for a price stated in the deed of sale as Rs. 1,940. Then on 11th July 1905, the vendee tendered Rs. 1,133-5 to the two aforesaid mortgagees by way of redemption of their $\frac{2}{3}$ share, whereupon the latter took the money and gave a receipt; and on 18th June, 1906, plaintiff sued for pre-emption. Various pleas were put in, and in the end the first Court gave plaintiff a decree for possession on payment of Rs. 1,940. The money was duly paid in. The vendee appealed to the Divisional Court, taking only the ground that by accepting his share of mortgage money plaintiff had waived his right of pre-emption; and that Court, finding the point in vendee's favour, dismissed plaintiff's suit.

This further appeal by plaintiff impugns that finding, and the question of waiver is the only question now in dispute between the parties. The alleged waiver is said by vendee's counsel to be a matter of inference, the facts from which it is to be inferred being the acceptance by plaintiff of his share of the mortgage money, his absolute silence at the time as to any intention to sue for pre-emption, delay in suing for 11 months, and the circumstance that plaintiff even allowed splitting of the mortgage and partial redemption.

We are not disposed to hold that this amounts to proof of waiver. Plaintiff was mortgagee and so was entitled to take his money when offered to him. The offer was made within 3 weeks of the sale, and we do not think that at this early stage a plaintiff, to whom the law allows 12 months to make up his mind whether he will sue or not, is bound to announce to the world or to the vendee what he proposes to do. Even if at the time he had made up his mind to sue when he could arrange for the necessary funds, or when it should otherwise be convenient, we

do not see that he was called upon to inform the vendee of his intention and so give the vendee time to pass the land on to another person before plaintiff's suit could be filed. Equally we do not think the delay in suing is material.

The authorities cited before us are the following :—

- (i) 138 *P. R.*, 1888, in which the mortgagee himself demanded his money from the vendor, and waiver was held established ;
- (ii) 154 *P. L. R.*, 1906, in which vendee sent a formal notice to mortgagee that he (vendee) had bought and that he (mortgagee) should take his money, and waiver was inferred by the Court ;
- (iii) 2 *All. L. J.* 145 (1905), in which it was held that mere acceptance of his money by mortgagee from vendee is no waiver of right of pre-emption ;
- (iv) *I. L. R.*, IX *All.*, 234, where there was a suit for redemption against the mortgagee by the vendee, and mortgagee, saying nothing about his intention to sue for pre-emption, merely pleaded successfully to the jurisdiction and got the suit dismissed. Here too no waiver was inferred by the Court ;
- (v) 32 *P. R.* 1884, in which there was first a mortgage to defendant, then a sale to plaintiff, and then a sale by owner to defendant, and, plaintiff suing for possession under his purchase, defendant pleaded that that purchase was invalid and also pleaded that he was entitled to a right of pre-emption, whereupon the Court held that the latter plea was no answer to the suit, and defendant must sue separately for pre-emption. The distinction between the first of these cases and the case before us is obvious, for in the former the mortgagee himself positively elected to recognise the validity of the sale by demanding his own rights from the vendee. The third case is directly in favour of the view we take, and the fourth case, though perhaps only indirectly, is strongly in favour of the same view. The value of the fifth case is that it shews that the right of pre-emption is a right which the pre-emptor may urge (and in some cases must urge) inde-

pendantly of other questions or disputes relating to the property sold.

There remains the case from the *P. L. R.* The decision there at first sight appears to conflict with our view; but Chitty, Judge, expressly lays it down that each case must be determined on its own peculiar facts. There the formality of the notice to the mortgagee is a factor in the problem, and further we are inclined to hold that the actual decision goes too far. On the facts in the present case we do not think waiver can properly be inferred.

We, therefore, accept this appeal, set aside the finding and decree of the learned Divisional Judge, and restore the decree of the first Court. Vendee-respondent will pay the costs of the plaintiff-appellant in the lower Appellate Court and in this Court.

Appeal accepted.

MISCELLANEOUS SIDE.

No. 40.

CIVIL.

Before Mr. Justice Chatterji, C. I. E.

MULA RAM, AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

BARHMI, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 379 OF 1907.

CIVIL MISCELLANEOUS No. 504 OF 1907.

Civil Procedure Code (Act XIV of 1882) Sections 202, 623—Judgment—Clerical errors—Review not necessary.

When inadvertently wrong words are used in a judgment in describing the property in suit the corrections may be made on an application under Section 202 of the Civil Procedure Code and an application for review is not necessary to do so.

Application under Section 202 Civil Procedure Code.

Mr. Ishar Das, Pleader for Appellants.

Mr. Vishnu Singh, Advocate for Respondents.

JUDGMENT.

CHATTERJI, J.—(21st January, 1908).—Respondents' counsel objects that there should be an application for review but I overrule the objection, as the petitioner merely seeks to correct certain inadvertent clerical errors which do not express my real meaning.

The application falls under Section 202 Civil Procedure Code.

After hearing parties I direct that the words "Northern and Eastern boundaries" in the 2nd paragraph of page 4 of the copy of the judgment with the record be altered to "Northern and Western" and the words "West and the East" in the same sentence to "South and the East." And the words "South West Corner" on the top of page 5 to "South East Corner" and the words "Verandahs to the West and South" in the next sentence in the same page to "Verandahs to the East and South." This expresses what I meant in the judgment and the wrong words were used through inadvertence.

I have made the corrections in the original judgment in red ink and initialled them.

The defendants were told by the notice issued by me that they need not appear unless they objected to the corrections.

They have appeared and objected and I accordingly award Rs. 10 costs to the petitioners.

Barhmi defendant-respondent died after the remand from this Court and his heirs have been impleaded in the Divisional Court and I note that they have appeared and defended this application.

- — — —

APPELLATE SIDE.

No. 41.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Chatterji, C. I. E.

CHUNI LAL,—(PLAINTIFF)—APPELLANT,

versus

Mian GHULAM FARID KHAN AND OTHERS,—(DEFENDANTS)—

RESPONDENTS.

CASE No. 925 OF 1907.

Practice—Transfer of Judge—Propriety of re-opening questions already decided—Mortgage—Redemption—Decree—Interpretation of—Accounting.

When a Judge gives his decision on some of the questions involved in a case leaving the remaining questions to be determined at a subsequent date the Judge who succeeds him in the mean while does not act properly, though not illegally, in passing judgment contrary to the decision given by his predecessor, especially in a case when the judgment is open to appeal. It is only when there is an obvious and patent error in the earlier decision that a successor should re-open a question in an appealable case.

A mortgagee obtained a decree that he was entitled to recover the mortgage money from the mortgaged and other property of the mortgagor and the latter was also made personally liable for a part of the sum decreed. The mortgaged property was in possession of the mortgagee under the terms of the mortgage for profits to be realized in lieu of interest. The mortgagor brought a suit for redemption and claimed deduction for the profits realized by the mortgagee from the amount adjudged against him by the decree.

Held, that the claim was valid under the terms of the decree.

Under the peculiar circumstances of the case it was ordered that on the mortgagor's failure to redeem within the fixed period he would not be able to redeem in execution of the decree passed in the case.

Further appeal from the order of the Divisional Judge, Amritsar Division, dated the 13th June, 1907, reversing the decree of the District Judge, Gurdaspur, dated the 7th January, 1907.

Rai Sahib Lala Sukh Dial, Pleader, for Appellant.

Mr. Fazal Husain, Advocate, for Respondents.

JUDGMENT.

ROBERTSON, J.—(19th January, 1908).—The facts of the case are given in the judgments of the lower Courts and need not be recapitulated here.

The first point we have to notice is that on the 2nd April, 1907, Captain Irvine, then Divisional Judge, decided all the points in issue with the exception of one trivial question as to a small sum to be allowed or disallowed and remanded the case under Section 566, Civil Procedure Code, for enquiry on this point only. Before the return was received Mr. Gracey succeeded Captain Irvine, and when the return was received showing Rs. 29-11-6 only to be due, for a particular period, Mr. Gracey, re-opened the whole case and reversed the decision of Captain Irvine, on the points decided by him after full and careful hearing and consideration.

As to Mr. Gracey's action we need only say that, while not illegal as Captain Irvine had not delivered a final judgment, it was undesirable and incorrect. It would be a most inconvenient practice to introduce and one which as pointed out in *Punjab Record* 134 of 1894 is not followed in this Court save under the most exceptional circumstances.

In this case an appeal lay to this Court and Mr. Gracey should simply have taken up the case at the point where it was left by his predecessor, declined to express any opinion of his own on the points de-

cided and passed order as to the point left open. It is only when there is an obvious and patent error in the earlier decision that a successor should re-open a question in this manner in an appealable case.

The main question before us is this. The appellant mortgaged certain land to the respondent by two deeds, dated 3rd September, 1896.

The mortgage was not a divisible transaction and under the mortgage deeds the respective rights of the parties *qua* the mortgages were defined. It is quite immaterial in what particular clause the rights of each are mentioned. One of the rights given to the mortgagee was to compel re-payment of the mortgage money after giving one year's notice of such intention. Another of the mortgagee's rights was to hold the property in possession and to take the entire produce until the debt was discharged. This was not stated to be in lieu of interest but it was clearly so intended.

On 29th October, 1901, the mortgagee filed a suit for the amount of the mortgage-money and obtained a decree dated 28th January, 1902, to the effect that he was entitled to recover Rs. 3,520 from the mortgaged and other property of defendant and out of this the judgment-debtor was held to be personally liable also for Rs. 1,490 of the amount. Defendant also had to pay plaintiff's costs. It is contended for the respondents and has been found by the learned Divisional Judge, that the mortgage security has not merged in the decree and that although the decree confers no such rights and gave no such relief that the mortgagee is still entitled to hold the mortgaged land in possession to annex all the proceeds and to render no account of them to the mortgagor, until the whole of the secured debt is discharged.

We do not think it necessary to enter into any abstruse discussions of the doctrine of merger, or to discuss at length the principles laid down in Ghose on Mortgages page 553 *et seq.* They are not applicable to this case. What we have here clearly is an adjudication upon the rights of the parties under the mortgage deed. That deed was not divisible. It was open to the plaintiff when he sued for his money to claim also the right to retain possession of the security and take the produce until the debt was discharged. He did not do so, and certainly the decree into which such a condition could have been easily incorporated contains no such provision. This may or may not have been the result of inadvertence or mistake on the part of the plaintiff in that suit but we

cannot go behind the decree which defines the rights of the parties under the deed and the relief to which the mortgagee is entitled under it. The land mortgaged was merely security for the debt, the debt and the security are defined in the decree and the mortgagee is not entitled to the income of the mortgagor's property which forms the security for the debt. Section 43, Civil Procedure Code, last para is not without bearing on this point. It would have been open to the Court to decree this or to decree *post diem* interest, and the defendant appellant must be accounted fortunate that this has not been done, but it is not possible for us to do so now.

The suit before us is a suit for redemption on making a certain payment. The question before us is whether or not the mortgagor is entitled to credit for the produce enjoyed by the mortgagee from the mortgaged lands in his possession. Under the terms of the decree we think he is clearly so.

As to the amount to be allowed we think that the method of computation employed by Captain Irvine, is fair to all parties and is the most satisfactory possible under all the circumstances of the case. This gives an annual income of Rs. 72 (Rs. 71-13-6) which we allow from the 16th October, 1902, the date of Nand Lal's *patta* to 11th April, 1908. This comes to (?)—

To this must be added Rs. 30 (Rs. 29-11-6) on account of the period between 28th January, 1902, the date of the decree and 16th October, 1902—as found by the first Court on remand.

The total to be deducted therefore from the total debt of Rs. 3,520 is Rs. 396 + Rs. 250 + Rs. 30 or Rs. 676 in all.

If Rs. 2,844 is paid to the mortgagee by the end of *Chet* next (11th April, 1908) the property will be redeemed forthwith.

This decree will only affect the decree held by Ghulam Farid and others against the appellants dated 28th January, 1902, in so far that it will now be settled as *res judicata* that the amount of debt due to the mortgagee on 11th April, 1908 is Rs. 2,844.

Under the peculiar circumstances of the case we decree that if the appellant plaintiff in this suit does not redeem the land by the 11th April, on or before that date, he will not be able to redeem in execution of this decree.

Inasmuch as the plaintiff has made no real effort to pay off the debt we decide that each party shall pay his own costs.

REVISION SIDE.

No. 42.

CRIMINAL.

Before Mr. Justice Reid and Mr. Justice Shakh Din.

SUNDAR, AND OTHERS,—PETITIONERS,

versus

THE CROWN,—RESPONDENT.

CASE NO. 260 OF 1907.

Revision—Criminal cases—Judicial proceeding—Punjab Laws Act (IV of 1872), Section 45—Vagrant—Order requiring foreign vagrants to leave district.

Held, that an order passed under section 45 of the Punjab Laws Act, requiring a band of foreign vagrants to leave a district being an executive order, is not open to revision by the Chief Court.

Petition for revision of the order of H. A. Rose, Esquire, Sessions Judge, Multan Division, dated 8th January 1907.

Mr. Fazal Ilahi, Advocate, for Petitioners.

Mr. Turner, Government Advocate, for Respondents.

JUDGMENT.

REID, J.—(5th June 1907.)—The District Magistrate of Montgomery issued an order, purporting to be under Section 45 of the Punjab Laws Act, to the petitioners to leave the district within fifteen days.

The petitioners obeyed the order and have filed this application for revision.

On the materials before us the order complained of appears to be illegal, the petitioners apparently not forming part or the whole of a band of foreign vagrants but being cultivators or owners of land in the Montgomery District.

The section is applicable to a band of foreign vagrants only.

The question for consideration is, whether the order complained of is open to revision by this Court. The District Magistrate was, in our opinion, acting in an executive, not in a judicial, capacity. The section empowers the District Magistrate, *es nomina*, to act, and the District Magistrate, therefore, described himself as such, not as Deputy Commissioner.

No penalty is provided for disobedience to an order under the section. The District Magistrate's means of enforcing the order is by report to the local Government under Section 46.

Had fine or imprisonment been prescribed for disobedience revision might lie, and no appeal to this Court is provided as in Section 42. Having regard to the terms of Sections 45 and 46, to the absence of

any penalty and to the absence of any special provision for interference by this Court, it has, in our opinion, no power to interfere. The petitioners' remedy is by appeal to the local Government. If they return to the Montgomery District, the District Magistrate can proceed under Section 46 of the Act.

Petition dismissed.

APPELLATE SIDE.

No. 43.

REVENUE.

Before The Hon'ble Mr. T. Gordon Walker, C.S.I., Financial Commissioner, Punjab.

JAFAR KHAN,—APPELLANT,
versus

Raja AZIMULLAH KHAN,—RESPONDENT.

CASE No. 23 OF 1906-07.

Zaildar—Candidate belonging to the prevailing tribe in a zail.

Where two or more candidates are equally qualified to be appointed as *zaildars*, the one belonging to the tribe prevailing in the *zail* should be given preference.

Further appeal from the order of M. W. Fenton, Esquire, Officiating Commissioner of Rawalpindi, reversing the order of P. D. Agnew, Esquire, Collector, and A. J. W. Kitchen, Esquire, Settlement Collector of Rawalpindi, dated 23rd and 24th August 1906.

Mr. Pestonjee, Advocate, for Appellant.

Mr. Madusudan, Advocate, for Respondent.

JUDGMENT.

THE FINANCIAL COMMISSIONER.—(17th April 1907.)—The Collector and Settlement Officer appointed Jafar Khan to be *zaildar*, and respondent, Azimullah Khan, to be *inamdar*. The Commissioner has reversed the order, making the latter *zaildar* and the former *inamdar*. The question is one of balancing the respective merits of the two claimants to the *zaildari*, and on full consideration it appears to me that the Commissioner's decision is the sounder one. What affects me a good deal is the fact that Azimullah Khan is a *Ghakkhar*, which is undoubtedly the prevailing tribe. The only doubt, and what apparently influenced the Collector and Settlement Officer, is whether Azimullah Khan would be a good "working" *zaildar*, for we certainly don't want a figurehead in the appointment. But I think that what Commissioner says on this point is sufficient to remove this doubt. It seems to me that he is quite

equal to performing the duties in person, and that he will do so.

On the whole, I think that Azimullah Khan is clearly entitled to the appointment in preference to Jafar Khan, his qualifications being superior.

I dismiss the appeal ; but it is unnecessary to allow costs.

Appeal dismissed.

REVISION SIDE.

No. 44.

REVENUE.

Before The Hon'ble Mr. T. Gordon Walker, C.S.I., Financial Commissioner, Punjab.

MOHAR SINGH, AND OTHERS,—(PLAINTIFFS)—PETITIONERS,
versus

JHANDA, AND OTHERS,—(DEFENDANTS)—RESPONDENTS.

CASE NO. 197 OF 1906-07.

Punjab Tenancy Act (XVI of 1887), Sections 53 and 60—Landlord and Tenant—Occupancy rights. Alienation of—Acquiescence of landlord—Omission to sue for cancelment of alienation.

Held, that from mere omission on the part of the landlord to sue for 15 months for cancelment of alienation of occupancy rights his acquiescence in the alienation cannot be inferred.

Petition for revision of the order of C.J. Hallifax, Esquire, Commissioner, Jullundur Division, dated 24th September, 1906.

Mr. Gouldsbury, Advocate, Sardar Kharak Singh, Pleader, for Petitioners.

Mr. Mc Donald, Pleader, for Respondents.

JUDGMENT.

THE FINANCIAL COMMISSIONER.—(16th April 1907).—I have admitted this as a further appeal on the question of acquiescence.

I think that Commissioner has omitted one important point. In *Rhaga v. Karishan Deo* (1), the case was of a sale by a registered deed and a suit brought four years after mutation was effected. There were other circumstances, which also distinguish that ruling from the present case. The ruling quoted was founded on *Jewan Singh v. Maharaja Jagat Singh* (2) and *Bakhsha v. Fateh Muhammad* (3).

In the present case I think that the lower Courts have rather confused two entirely different things ; (1) immediate consent, and (2) subs-

(1) 8 P. R. 1904, Rev.

(2) 1 P. R. 1888, Rev.

(3) 2 P. R. 1898 Rev.

quent acquiescence. I observe that the first Court framed its first issue "Was the alienation made with the previous consent of the landlords ; and, if so, was a notice under Section 53 unnecessary?" The first Court found that there had been consent and that this took the place of the notice required by law. The Collector, on the other hand, found on the facts that there had been no consent. The Commissioner's conclusion is that the co-proprietors generally knew of the transfer and acquiesced in it.

As regards the question of actual *consent*, it would be impossible to accept the finding of the first Court, and I think Collector was right in not doing so. It could not be inferred from a mere note of the *Tahsildar* (to which, of course, no presumption under Section 44 of the Land Revenue Act attaches) to the effect that "the co-proprietors do not object;" that all the co-proprietors were present and consented. If that were so, why should the plaintiffs have brought a suit to have the alienation set aside so soon after? It seems clear that the co-proprietors were and are in two parties, of which one sided with the vendee and consented. These latter are now defendants. The note made by the *Patwari* in his report on the mutation "*alabd Mohar Singh lambardar*," would, if signed or sealed, have been conclusive on the point. But there is not even a mark below it; and it is therefore, if anything against the defendants, as evidence that it was intended to get the consent of Mohar Singh, *Lambardar*, but that this was not found possible.

I have no doubt, then, that there was no *consent*, and it remains to consider the question of *acquiescence* on which Commissioner appears to have decided the case. A perusal of the judgments of 1898 and 1904 will show that the principal point on which the decisions turned in all three was that the objectors had allowed undue delay to occur in asserting their claim. There were, of course, other circumstances which went towards the constitution of *acquiescence*, but this was the main element. In the rulings of 1898 M. Thorburn observed that "when a landlord is fully aware that a tenant (with occupancy rights) has transferred his right of occupancy without having previously obtained the consent of the landlord in writing, unless that landlord sues *within a reasonable time* to cancel the voidable transfer, his acquiescence may be inferred as to what constitutes a *reasonable time*, must depend on the circumstances of each case; in some it might be two years, in some three or more." Applying this principle to the present case I find—

Deed of sale, dated 9th February 1904.

Mutation, dated 16th November 1904.

Suit instituted, dated 28th February 1906.

The suit was instituted 15 months after mutation was effected ; that must be taken as the starting point ; and it cannot be said that there was undue delay in bringing the suit. Even if plaintiff had knowledge of the mutation, apart from the question of their consenting to the transfer, it could not well be held that they had slept on their rights, or had not asserted them without undue delay. These questions of subsequent acquiescence must always be questions of *degree*, and here I think that acquiescence cannot be inferred from the conduct of the plaintiff in regard to the litigation.

I accept the appeal and restore the order of the Collector. Plaintiff will get a decree, cancelling the sale, with costs throughout.

Appeal accepted.

REVISION SIDE.

No. 45.

CRIMINAL.

Before Mr. Justice Shah Din.

AMIN CHAND, AND OTHERS,—(ACCUSED),—PETITIONERS,
versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 572 OF 1907.

Criminal Procedure Code (Act V of 1898), Section 257—Cross-examination of prosecution witnesses—Right of accused.

It is the duty of the Magistrate to re-summon for cross-examination, after charge is framed against the accused, all or any of the prosecution witnesses that he may demand, and he cannot be called upon to pay expenses of the witnesses.

Case reported by S. W. Gracy, Esquire, Additional Sessions Judge, Ferozepore Division, dated 25th April, 1907.

REPORT.

The facts of this case are as follows—

One Ismail purchased *gur* from the accused at rate of 6 seers per rupee. The complainant offered to sell to him at rate of 7 seers per rupee and returned the accused's *gur*. The accused Nos. 1 to 3 then insulted and abused the complainant and were joined by accused No. 4.

The accused on conviction by Lala Jagan Nath, exercising the powers of a Magistrate of the 1st class in the Ferozepore District, were sentenced by order, dated 19th February 1907, under Sections 504 and

352 of the Indian Penal Code : Amin Chand to a fine of Rs. 15 or one month's rigorous imprisonment; Nandu and Chuhar to a fine of Rs. 7, each or two weeks' rigorous imprisonment ; and Maghi Mal to a fine of Rs. 5 or two weeks' rigorous imprisonment in default.

The proceedings were forwarded for revision on the following grounds—

The accused applied to the Magistrate that the prosecution witnesses should be re-called for cross-examination after the charge had been framed. The Magistrate did not re-call them on the ground that the accused had not put in the necessary expenses. This order was wrong. The accused were not bound to put in their expenses, and it was the duty of the Court to re-call them. The defect seems to vitiate the trial and either the conviction must be quashed or the accused given an opportunity of cross-examination.

The procedure contemplated in the Criminal Procedure Code is that the prosecution witnesses should be heard, the charge framed and the accused called upon to cross-examine the prosecution witnesses at one consecutive hearing, continued, if necessary, from day to day, and the prosecution witnesses should not be discharged till the accused have been questioned whether they wish to cross-examine after the charge. Where, however, the hearing is not consecutive, as in the present case, and the prosecution witnesses are allowed to leave before the charge is framed; it is the duty of the Magistrate to re-call them, presumably at the public expense, if the accused so demands after the charge is framed.

JUDGMENT.

SHAH DIN, J.—(12th June 1907).—For the reasons recorded by the learned Additional Sessions Judge, in which I fully concur, I quash the convictions and sentences, which, under the circumstances, were illegal and direct the Magistrate to resume the proceedings at the stage they had reached when he improperly refused to re-call the witnesses for the prosecution for the purpose of being cross-examined by the accused. The defect does not vitiate the whole trial *ab initio*, and the proceedings as far as the framing of the charges appear to have been quite regular.

APPELLATE SIDE.

No. 48.

CRIMINAL.

Before Mr. Justice Reid and Mr. Justice Shah Din.

BHOLA,—(CONVICT),—APPELLANT,
versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 224 OF 1907.

Criminal Procedure Code (Act V of 1898), Section 164—Evidence Act (I of 1872), Section 26—Confession recorded in native territory.

A confession duly recorded by a Magistrate in a native territory in proceedings under the provisions of the Code of Criminal Procedure is admissible in a trial in British India.

Appeal from the order of H. P. Tollinton, Esquire, Sessions Judge, Lahore Division, dated 8th January 1907.

JUDGMENT.

REID, J.—(4th June 1907.)—On the 26th January the appellant, who escaped after wounding Alla Din, and was arrested in Jammu territory on or after the 24th January, confessed to a Jammu Magistrate of the 2nd class that he had killed Alla Din and had intended to kill him.

The confession was retracted in the Court of the Committing Magistrate and of Sessions, but we see no reason for holding that it was not made voluntarily and does not accurately represent the facts.

It was recorded under Section 164 of the Code of Criminal Procedure and duly certified. *Queen-Empress v. Sundar Singh, and others* (1) and *Patel Pand Chand v. Ahmadabad Municipality* (2) are authority for holding that a confession duly recorded by a Magistrate in Native territory in proceedings under the provisions of the Code of Criminal Procedure, is admissible in a trial in British India.

* * * * *

NOTE.—The rest of the judgment is not material for the purposes of this report.

APPELLATE SIDE.

NO. 47.

CRIMINAL.

Before Sir William Clark, Kt., Chief Judge and Mr. Justice Shah Din.

THE CROWN—(PROSECUTOR),—APPELLANT,

versus

HIRA SINGH, AND OTHERS,—(ACCUSED),—RESPONDENTS.

CASE NO. 93 OF 1907.

Criminal Procedure Code (Act V of 1898), Section 345—Penal Code (Act XLV of 1860), Section 147—Compounding of non-compoundable offence.

A Magistrate is not competent to acquit the accused by allowing a non-compoundable offence to be compounded by the parties. The magistrate must observe the procedure prescribed for trial of such offences, and is not at liberty without recording evidence to express an opinion that the offence committed is probably not the one with which the accused is charged.

Appeal from the order of Sardar Ragbir Singh, Magistrate, 1st class, Jullundur, dated 20th October 1906.

The Government Advocate, for Appellant.

Mr. Shah Nawaz, Advocate, for Respondent.

(1) *I.L.R.* XII All., 595.

(2) *I.L.R.* XXII Bom., 235.

JUDGMENT.

SHAH DIN, J.—(8th May 1907.)—After hearing the learned Government Advocate and the counsel for the respondents, we think that this appeal must succeed. The respondents were *challaned* to stand their trial for the offence of rioting under Section 147, Indian Penal Code. The Magistrate examined the complainant, Kirpa Ram, at some length at the first hearing, and then adjourned the case to another date. On that date no evidence for the prosecution was taken, and as the complainant expressed a desire to compound the offence with which the accused persons were charged, the magistrate allowed him to do so and acquitted the accused under Section 345, Criminal Procedure Code. Now it is clear that under Section 345 the magistrate had no power to allow the offence of rioting to be compounded, as the said offence is not mentioned either in sub-section (1) or sub-section (2) of Section 345, and the order of the magistrate acquitting the accused persons was, therefore, *ultra vires*. The reasons given by the magistrate for permitting the complainant to compound the offence in question are, so far as his power to act under Section 345 is concerned, wholly unsound. He says: "It is probably better for the complainant to be on good terms with the accused who also wish for the compromise. It is quite probable that the case might in the end turn out to be a case under either Section 323, 324 or 325, Indian Penal Code. I think that the case is really one under Section 324, Indian Penal Code. * * * I, therefore, declare this case to be one under Section 324 or 325, Indian Penal Code, and allow the case to be compromised."

Now, the magistrate did not take the evidence for the prosecution at all as he was bound to do under Section 252, Criminal Procedure Code, and his finding that the case was really one under Section 324 or Section 325, and not one under Section 147, Indian Penal Code, was based upon a surmise. Counsel for the respondents relied upon sub-section (2) of Section 253, Criminal Procedure Code, in support of the magistrate's action, but the latter did not proceed under the provisions of the above sub-section, inasmuch as the accused persons were not *discharged* by the magistrate, nor did he record any reasons for discharging them so far as an offence under Section 147, Indian Penal Code was concerned. The composition of an offence under Section 345, Criminal Procedure Code, has the effect of an *acquittal* and not of a discharge and therefore Section 253 (2) has no bearing upon the case at all.

Moreover, the offence of rioting under Section 147, Indian Penal Code, being an offence against the public tranquillity, primarily concerns the State more than the individual, and that is probably one reason why that offence is not included by the Legislature in the category of the offences which can be compounded by the person immediately affected even with the permission of the Court by which the trial is held.

For the above reasons, we hold that the order of the magistrate acquitting the accused persons under Section 345, Criminal Procedure Code, was one passed without jurisdiction. We, therefore, set aside the order, and direct the magistrate to proceed with the trial in accordance with law.

Appeal allowed.

APPELLATE SIDE.

No. 48.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

JAHAN KHAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

DALLA RAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 487 OF 1906.

Punjab Alienation of Land Act (XIII of 1900)—Mortgage in favor of agriculturist benefiting mortgagor's creditors—Duty to enforce.

Where the Divisional Judge refused to decree possession of mortgaged property in favor of the mortgagee who was not debarred from taking the mortgage by the provisions of the Punjab Alienation of Land Act and had agreed to pay previous debts of the mortgagor and gave reason that the Act cannot be permitted to be circumvented by rival money lenders.

Held, that the Divisional Judge was clearly wrong in refusing the decree on the ground stated by him.

Further appeal from the decree of W. A. Harris, Esquire, Additional Divisional Judge, Shahpur Division, dated 28th February, 1906.

Rai Sahib Lala Sukh Dial, Pleader for Appellants.

Bhagat Ishar Das and Bhagat Gobind Das, Pleaders for Respondents.

JUDGMENT.

ROBERTSON, J.—(11th January, 1907).—The facts in this case appear to be as follows :—

The plaintiffs, Jahan Khan and others, sue for possession of certain land mortgaged to them by one Ali Khan on 5th March 1904 for Rs. 2,210. The consideration is stated to be. Rs. 1877 on account of book debts to Mul Chand, Megh Raj and Bela Ram. Rs. 256 to be paid to one Ude, a previous mortgagee, the mortgage being without possession. The mortgagor admits the debt of Rs. 1,877 to have been due to Mul Chand, Megh Raj and Bela Ram, but says that this debt has now been discharged. He also admits that Rs. 256 was due to Ude. Petty items were Rs. 45-5-0 cash and Rs. 35 expenses of registration. The mortgagor also pleaded that the real mortgagees are Mul Cand, Megh Raj and Bela Ram, and tries to shelter himself behind the Alienation Act.

Now it is quite clear that Mul Chand, Megh Raj and Bela Ram have given up their claim against the defendant-mortgagor. It is also quite clear that Ali Khan executed the mortgage in favour of the plaintiffs, and that under that mortgage he the plaintiff, an agriculturist, is entitled

to possession. He has obtained a discharge for the mortgagor of the debt of Rs. 1,877 which is all that concerns the mortgagor in that connection, and he has tendered Rs. 256 and paid that sum into Court for Ude, the previous mortgagee, whose hypothecation gave him no claim to possession. It was not contended here that the mortgagee was not entitled to possession as against the mortgagor. He has fulfilled, *qua* the mortgagor, the terms of the mortgage.

The learned Divisional Judge, however, writes, "an important Act like the Punjab Alienation of Land Act is not to be permitted to be circumvented by rival money lenders, and I shall not allow it." That is not a correct way of looking at the matter. All acts of the legislature are equally important and equally to be carried out by the judiciary who are not entitled to go beyond them. Here we have a mortgage, perfectly legal on the face of it, executed in favour of an agriculturist who seeks the aid of the Courts to enforce his rights, as between him and the mortgagor there is no infringement whatever of the Land Alienation Act in granting the relief claimed. The object of the Act is not to prevent money-lenders from recovering sums justly due to them by any legal means in their powers, and if they can induce an agriculturist to pay off a debt due to them and to take a mortgage from their debtor as security for himself there is nothing in the Act to prevent such a course. Indeed the object of the Act is attained, rather than defeated by what has occurred here. Without the Act, Mul Chand, Megh Raj and Bela Ram, non-agricultural money-lenders, would undoubtedly have taken the mortgage themselves and obtained possession of the land. The Act prevents this, though of course they could have taken a mortgage in one of the specified permissible forms. But Jahan Khan is prepared to lend the debtor the money necessary to pay off the money-lenders and to take the land in mortgage himself, he being an agriculturist and we are only asked to decree him relief. If Mul Chand, etc., really are at the back of Jahan Khan, the Land Alienation Act can be properly invoked should they ever attempt to assert any right to the possession of the land in virtue of the mortgage now before us. So far as Jahan Khan is the mortgagee, Jahan Khan asks for possession under his deed; he is entitled to it, and there is nothing in the Land Alienation, or any other Act, which justifies us in refusing him the relief to which he is legally entitled. We, accordingly, accept the appeal, set aside the judgment and decree of the learned Divisional Judge, and decree plaintiffs' claim to possession against the mortgagor with costs throughout.

As regards Ude, the holder of the previous mortgage without possession, it was unnecessary to have made him a party; he denies that Rs. 256 is all that is due to him, and he is not in possession and cannot resist the present claim to possession. As regards him therefore the suit is dismissed with costs throughout.

Appeal accepted.

APPELLATE SIDE.

No. 49.

CIVIL.

Before Mr. Justice Chatterji, C. I. F. and Mr. Justice Robertson.

BUTA SINGH,—(DEFENDANT),—APPELLANT,

versus

TARA SINGH,—(PLAINTIFF),—RESPONDENT.

CASE No. 888 of 1906.

Custom—Pre-emption—Houses—Mohalla Wadharian of Sialkote City—Improvements—Liability of pre-emptor.

Held, that the custom of pre-emption in respect of sales of houses was found to exist in Mohalla Wadharian of Sialkote City.

The right of the vendee to recover from the pre-emptor his outlay in improvements depends upon a rule of equity, the application of which varies with the facts of each case, on which it is brought to bear. Strictly speaking the vendee is not entitled to be re-imbursed for improvements which were not made in good faith. Where no claim is made for a long time, there may be an equity against compelling the vendee, not to improve his property on the mere chance of a claim for pre-emption being made; but where notice of claim is given without loss of time, followed by a suit in Court in which injunction is obtained against the vendee to stop the building, the vendee would not be entitled to recover the market-value of his improvements, and at best be allowed to remove them when it could be done without injuring the property. There is, however, another rule of equity under which any benefit that will accrue to the plaintiff from defendant's expenditure should be paid for by the former: provided, of course, that the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them.

First appeal from the decree of Sardar Balwant Singh, District Judge, Sialkot, dated 30th June, 1906.

Bhagat Ishar Das and Bhagat Gobind Das, Pleaders for Appellant.

Messrs Pestonji Dadabhai and Nanak Chand, Advocates for Respondent.

JUDGMENT.

CHATTERJI, J.—(1st June, 1907).—This case and Civil Appeal No. 805 of 1906 are cross appeals and will be decided by one judgment.

They arise in a suit for pre-emption of a house in *muhalla* Wadharian, in the city of Sialkot, which has been decreed by the District Judge. The defendant now appeals on the grounds that the suit should have been dismissed as there is no custom of pre-emption in this *muhalla* and that the sum allowed for improvements is too small. The plaintiff appeals on the ground that the price has been fixed at too high a figure, and that nothing, or at all events not the sum fixed by the lower Court, should have been allowed for improvements.

The parties are related by marriage, and the case has therefore been conducted with much bitter feeling on both sides. The defendant is a man of wealth and position while plaintiff is the cousin of defendant's wife and his family is said to have derived considerable benefit from the connection.

Taking up defendant's appeal first for consideration, we are of opinion that the custom of pre-emption is sufficiently established in the sub-division of Sialkot in which the house is situate. The reasons for the finding of the lower Court, that the custom exists in this *muhalla* appear to us to be quite sound. In the first place there have been several cases in this *muhalla* in which the custom has been affirmed, and there have been numerous others in other *muhallas* of the city. The learned pleader for the defendant-appellant minutely criticized some of the judgments previously passed granting decrees for pre-emption, but we find ourselves unable to reject a multitude of judicial decisions in favour of pre-emption on the ground that the findings on the evidence should have been otherwise and that the proper kind of instances, or a sufficient number of them, was not before the Court. Such a treatment of those cases is practically impossible now as the Court hearing the evidence is the best Judge of its value and as the decisions have been generally acquiesced in. In the case of *Alla Ditta v. Muthra* a full enquiry was made and the custom was found to exist. The objection taken to this judgment is that it is not a case of *muhalla* Wadharian, but of *Kucha Kharasian*; but the judgment clearly recites that the *Kucha* is part of the *muhalla*; and we cannot hold this to be wrong merely on the strength of the old *Khasra* map of 1865, which shows *Kucha kharasian* in a different colour. No question arises here of the house in suit not being in the Wadharian *muhalla*, and that case is at all events an instance of the custom being found to exist in an adjacent *muhalla*; and one instance of a judicial decision affirming the existence of pre-emption on contiguity in this *muhalla* is referred to in the judgment;

besides another precedent from another *muhalla*. In *Gobind v. Gura Ditta* in 1891, the custom was found to exist in this *muhalla*, and there is also an instance of a claimant for pre-emption having got a sale effected in his favour. The instances from other *muhallas* show that the custom is generally prevalent in the city of Sialkot, and the facts (1) that it is not found to prevail in the new *muhalla* of Karimpura, and (2) that in 1906, in *Rahim Bakhsh v. Karim Bakhsh* the Divisional Judge, following the principles laid down by this Court, held that the custom could not be held to be proved to exist in *muhalla* Hakim Hisam-ud-Din because no specific instance could be cited from it, do not affect the finding in regard to *muhalla* Wadharian, which is an old *muhalla*, and in which several instances have been proved, apart from the numerous others proved generally in other and adjoining *muhallas* of the city. Of course there have been numerous sales in the *muhalla*, but a claimant for pre-emption does not always come forward to litigate, and the want of claim generally proves nothing, while a single successful claim goes far to establish the custom. The Court below also noted on inspection of the spot that most of the sales relied on by the defendant were to people who would be entitled to pre-emption.

In short in our opinion the evidence in support of the custom of pre-emption is so clear that we have not called upon respondent's counsel for a reply on this point. We find accordingly in concurrence with the lower Court that the custom of pre-emption based on contiguity exists in *muhalla* Wadharian. There is no question that plaintiff is entitled to claim pre-emption if the custom is found.

The value of the improvements and the plaintiff's liability for them are points raised in both appeals and we shall consider these in disposing of the appeal of the plaintiff.

The first question for determination in the latter's appeal is whether the District Judge is right in finding that the price was fixed in good faith in the deed of sale, and that the whole of the purchase money mentioned therein was paid to the vendor. After hearing the arguments of the parties and reading of the record we are compelled to come to a conclusion different from that of the District Judge. Rupees 5,000 were paid before the Sub-Registrar and that officer's endorsement is in great detail and contains the serial numbers and value of the currency notes in which, with the exception of Rs. 50 in silver, the payment was made. The endorsement is of an exceptional character and differs from the usual run of such endorsements in which the total sum or the number of cur-

rency notes paid over is simply mentioned. It was probably made in this form at the vendee's request so that it might be impossible thereafter to deny that the full sum of Rs. 5,000 was, to the registering officer's personal knowledge, handed over to the seller. Compared with the careful and strictly businesslike nature of this payment, that of Rs. 1,000 before the execution and registration of the deed is singularly slovenly and unbusinesslike. To prove the payment two witnesses, Sundar Singh (page 68) and Shamas Din (page 69), and a receipt signed by the seller Ram Chand, dated 3rd October, 1904, *i. e.*, more than three weeks before the date of execution of the sale-deed, which was filed very late, are produced. The receipt recites that Rs. 700 had been paid on 20th August and Rs. 300 at the date of the document. It is admitted that there is no independent proof of the payment of Rs. 700. The witnesses are of the ordinary kind, and Shamas Din, who proves nothing about the payment, is defendant's servant, and merely deposes to payment of Rs. 300. The defendant has not in the witness-box sworn to the payment nor has he produced any books of account showing it. This statement that his wife supplied the money from her private funds does not satisfy us that it was in fact made. On the other hand, plaintiff has called one Bulaki Ram to depose that on 21st August 1904 Ram Chand borrowed Rs. 500 from him which, with Rs. 100 previously owed by him, Ram Chand repaid on 3rd November 1904 by giving one of the currency notes for Rs. 1,000 taken from defendant as part of the price of the house sold and entered in the Sub-Registrar's endorsement and taking the balance Rs. 400 from the witness. All these transactions are entered in Bulaki's books, Ram Chand had on 27th May, 1904 mortgaged the house to his brother-in-law Sukh Dial, for Rs. 500 (see page 13), and on 21st August, 1904 he repaid the loan and had the payment endorsed on the back of the mortgage-deed (see page 15). Defendant's case is that he supplied the money (Rs. 700) out of which the mortgage-money was paid, but of this, as already stated, there is no independent proof, whereas plaintiff's version is strongly corroborated by Bulaki Ram and his books. The District Judge has rejected the books, but in our opinion not on any cogent grounds, while it is not probable that Rs. 700 were advanced by defendant, without an acknowledgment which should have been forthcoming now or at all events mentioned in the receipt for Rs. 1,000.

On the whole we can come to no other conclusion than that the payment of Rs. 700 is not proved. We accept the receipt so far as to hold that Rs. 300 were paid under it. Doubtless some earnest money was

paid but Rs. 1,000 seems to be too large a sum to pay for such a purpose in the ordinary course of things and the proof therefore should have been cogent.

It follows that the price was not fixed in good faith and the market value of the house has to be assessed. This may be taken in connection with the value of the improvements.

The right of the defendant to recover his outlay in improvements depends upon a rule of equity the application of which varies with the facts of each case on which it is brought to bear. Strictly speaking, defendant is not entitled to be reimbursed for improvements which were not made in good faith. Here there was a defect of title in that the purchase was liable to be defeated at the suit of a pre-emptor. Where no claim is made for a long time, there may be an equity against compelling the purchaser, not to improve his property on the mere chance of a claim for pre-emption being made, but here notice of claim was given without loss of time on 12th November, 1904, within three weeks of the sale, and, again on 21st December, and the suit itself was filed on 16th January, 1905. The plaintiff asserted the fact of the notices having been given, in his plaint, and the defendant did not challenge it and we are, therefore, justified in assuming from the postal receipts filed that notices were so given. Plaintiff also on suing applied for an injunction to stop building so that he had done all he could to prevent a claim being made for improvements. Defendant apparently was very reckless in pushing on his building operations. Perhaps he hoped to induce plaintiff who was his relation to forego the claim but has failed. He would not be entitled to recover the market value of his improvements under the circumstances and at best be allowed to remove them when it could be done without injuring the house. There is however, another rule of equity under which any benefit that will accrue to the plaintiff from defendant's expenditure should be paid for by the former provided, of course, that the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them. There is no doubt that certain reconstructions have taken place in the house, and some additions have been made which have permanently increased its value and suitability as a place of residence, and for these we think a reasonable sum ought to be paid by the plaintiff. But it is extremely difficult to assess the value of these improvements. The defendant claimed Rs. 4,000 on account of them (page 39), and even in this Court he asks for Rs. 3,686-11-6 in his appeal. Jhanda for defendant (page 73)

produced books of account and said that the expenditure mounted to Rs. 4,283, and again that it was Rs. 4,574-12-0 up to 17th April 1906. Counsel before us admits that it cannot be predicated that all entries in the books refer to this house nor what portion of the expenditure was incurred on its account. In these circumstances we must reject the books and attempt to arrive at some conclusion from the rest of the record. These were two experts appointed to value the house with the improvements, but their estimates differ largely. That of Ram Parshad, Sub-Divisional Officer, Military Works, Rawalpindi, contains full details, but it is said that rates are too low and there, probably, is some foundation for the complaint. On the other hand the estimate of Mr. Fitz Holmes wants particulars and is apparently too high. Fitz Holmes was unable to say what new work had been done to the house. Mr. Ram Parshad's report mentions the new works in detail and estimates their value at Rs. 479-7-0 and the cost of the parapet wall of the roof at Rs. 92 and of repairs at Rs. 148. It is, however, said that a new *chaubara* has been built on the top story, but that the value of this has not been allowed for by him. It is difficult to say if this is true as the report gives merely the kinds of work for which separate valuations are made and does not mention the rooms, &c., of the house.

Ram Parshad was appointed commissioner for valuation by agreement of parties and his report, unless shown to be wrong, is entitled to *weight*. He was minutely examined on interrogatories and no question was put to him about the omission of the *chaubara*. It is unlikely that this should be so if there was a real omission or that he would make such an omission. It is probable, therefore, that the work of the *chaubara* is included in the various kinds of new work done to the house by the defendant given in Ram Parshad's report.

There is no reason to think that the house was sold under the proper value, and if the price actually paid was Rs. 5,300 we should be safe in holding that the real price was about that sum. As the house is no longer in its original state, it is practically impossible to obtain any further information about its value in that state. We accordingly find that the market price of the house was Rs. 5,300.

As regards improvements it is difficult to arrive at exact valuation of the benefits they have conferred on the house and the amount by which they have enhanced its value. We must take figures and the details from Ram Parshad's list and according to them they are worth Rs. 720. But as Ram Parshad's rates are said to be low and in order

to be on the safe side we increase the rates and raise the amount to Rs. 1,000 in lump. Defendant would then be entitled to Rs. 5,300 paid for the house and Rs. 1,000 for the improvements or Rs. 6,300 in all. Of course this cannot be very exact as we do not know to what extent the fabric of old house has been replaced by the improvements. But as Ram Parshad's estimate of the value of the house with the improvements amounts to Rs. 5,979, the extra amount we allow ought to be a fair compensation for the latter.

We accept plaintiff's appeal and reduce the amount payable by him to defendant for the house and the improvements to Rs. 6,300 with costs on that sum in the Divisional Judge's Court and on Rs. 1,760 in this Court. This sum will be deposited in Court within two months from this date failing which plaintiff's suit shall stand dismissed with costs.

The defendant's appeal is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

N.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

NARPAT RAI, AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

versus

DEVI DAS, AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 806 OF 1906.

Civil Procedure Code (Act XIV of 1882), Sections 2 and 523—Arbitration—Agreement to refer to arbitration filed in Court—Appeal against order of reference to arbitrators—Decree.

When an agreement to refer a case to arbitration is filed in Court under Section 523 of the Civil Procedure Code and reference is made to arbitrators by order of Court, the order is appealable as a "decree."

First appeal from the decree of Sheikh Miran Bakhsh, Sub-Judge, Lahore, dated 7th July, 1906.

Messrs. Grey, Muhammad Shafi, Advocates, Rai Sahib Lala Sukh Dial, and Lala Tirath Ram, Pleaders, for Appellants.

Messrs. Beechey, Ganpat Rai, Advocates, and Lala Durga Das, Pleader, for Respondents.

JUDGMENT.

RATTIGAN, J. (JOHNSTONE, J., *concurring*)— 9th January 1906).—Mr. Beechey, for respondents, urges as a preliminary objection that no appeal lies in this case, and the question which we have to decide, upon this objection, is whether an appeal lies when the Court acting under Section 523, Civil Procedure Code, causes an agreement to refer to arbitration to be filed and makes an order of reference thereon. It is common ground between the parties that an appeal lies in such a case only if the order of the Court is “a decree” as defined in Section 2 of the Code, that is to say, if it is “the formal expression of an adjudication upon any right claimed or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal.”

We have the authority of the Full Bench of this Court for the proposition that an order under Section 523 of the Code refusing to accept an application under that section is a decree and appealable as such (*Jhangi Ram v. Budho Bai*, 84 P. R. 1901 (1) (F. B.)). The question now before us is whether an order accepting such an application and making the order of reference as prayed for is also a decree.

Mr. Beechey argues that there is an essential difference between the two cases. If the application is rejected, the Court has finally adjudicated upon the matter before it so far as it is concerned. But if the application is accepted and a reference is thereon made to the arbitrators, the first step is taken in proceedings which are to be treated as a suit. The acceptance of the application (so Mr. Beechey contends) is the initial step in the suit. Once this step is taken, the “suit” really begins and the subsequent proceedings are proceedings in the suit so started, and the suit does not terminate until the arbitrators have given their award and the Court has passed a decree in the terms of the award. In support of his argument, the learned counsel referred to the provisions of Section 524, Civil Procedure Code, which provide that “the foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under Section 523 and to the award of arbitration, and to the enforcement of the decree founded thereon.” These provisions, according to the learned counsels’ argument, clearly imply that the “suit” is not terminated *ipso facto* on the making of the order of reference. The learned counsel further

(1) S.C. 112 P. L. R. 1901 (F. B.)

urged in support of his contention, that the order of reference under Section 523 does not in any sense, so far as the Court making it, decide the "suit." The Court, it is urged has still to wait the award of arbitration, and its final adjudication takes place only when it makes its decree upon the award. As another, but subsidiary argument, it is said that it would be most anomalous that there should be two decrees in one and the same suit, the one "decree" being the order of reference under Section 523 and the other "decree" being the decree made on the award. The latter argument does not seem to me to be fatal to appellants' contention, for, though anomalous, there can undoubtedly in some cases be two decrees in one and the same suit. For example, in a suit for dissolution of partnership there is first the preliminary decree for dissolution, and secondly the final decree. (See Nos. 132 and 133 of the form decree in Schedule IV of the Civil Procedure Code). I am not prepared, however, to say that there is no force in Mr. Beechey's argument in the other respects, but feel that the question before us is really concluded by the expression of opinion in their Lordships of the Privy Council decision in the case of *Ghulam Jilani v. Muhammad Hussan*, 25 P. R., 1902⁽¹⁾. In this case their Lordships pointed out that the chapter in the Code of Civil Procedure on *Reference to Arbitration* (Chapter XXXVI) deals with arbitration under three heads—

(1) "Where the parties to a litigation desire to refer any matter in difference between them in suit. In that case all proceedings from first to last are under the supervision of the Court."

(2) "Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court."

"(3) When the agreement of reference is made, and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to award."

The present case obviously falls under the second of the above headings, and with reference to such cases their Lordships observed: "In cases falling under heads II and III proceedings described as a "suit and registered as such must be taken in order to bring the matter"—the agreement to refer, or the award, as the case may be—under the "cognizance of the Court. That is, or may be, a litigious proceeding—

(1) S. C. 1 *Digust* 1902.

"cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code." This, no doubt, is a mere *obiter dictum*, but even, so, the Courts of this country are not entitled, in my opinion, to decide counter to so clearly an expressed opinion of the highest Court of Appeal. The Full Bench of the Madras High Court, with reference to the passage cited, remarked: "This is a considered *dictum* and is, we think, fully in accordance with the scheme and policy of the Code." (*Ponnasami Mudali v. Mandi Sundara Mudali*, *I. L. R.*, XXVII Mad., 255 at page 258). Mr. Beechey relies upon the decisions of the Allahabad High Court in *Katik Ram v. Babu Lal*, *I. L. R.*, XXVI All., 205 and *Basant Lal v. Kunji Lal*, *I. L. R.*, XXVIII All., 21, but these cases are clearly distinguishable, the decision in them being that an order under Section 525 refusing to file an award is not appealable. These decisions are, however, opposed to the ruling of the Full Bench of this Court in *Jangi Ram v. Budho Bai*, 84 P. R., 1901 (1) (F. B.) and to a number of rulings of the other High Courts (e.g., *Thiruvenga Datiengarh v. Vaidanatha Ayyar*, *I. L. R.*, XXIX Mad., 303 and *Janodkey Nath Guha v. Brojo Lal Guha*, *I. L. R.*, XXXIII Cal., 757).

I would, therefore, hold upon the authority of the passage quoted from *Ghulam Jilani's case* and the ruling in *Jhangi Ram's case* (for I cannot personally see any vital distinction *qua* the right of appeal, between an order accepting or an order rejecting an application under Section 523) that an appeal lies in the present case.

APPELLATE SIDE.

No. 51.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

TARA SINGH,—(PLAINTIFF),—APPELLANT,

versus

MUSSAMMAT CHANDI, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 385 OF 1906.

Specific Relief Act (I of 1877), Section 42—Declaratory suit—Plaintiff's chance of succession to the property in suit very remote—Dismissal of suit.

Where the plaintiff, whose claim of succession to the property in suit was a very remote one, sued to set aside a mortgage of the property and the suit was dismissed the Chief Court declined to make an order of remand for further enquiry in the case.

(1) A. C. 112 P. L. R. 1901 (F. B.).

Further appeal from the order of C. L. Dundas, Esquire, Divisional Judge, Lahore Division, dated the 10th January 1906, reversing the order of Lala Chuni Lal, Subordinate Judge, 1st Class, Lahore, dated the 13th May 1905, decreeing the claim.

Mr. Shelverton, Advocate, and *Lala Bhagwan Das*, Pleader, for Appellant.

Lala Lachmi Narain, Pleader, for Respondents.

JUDGMENT.

ROBERTSON, J.—(28th January 1907.)—After hearing arguments we are of opinion that the view taken by the learned Divisional Judge is correct. We think that the plaintiff's claims of succession are too remote to justify him in bringing a declaratory suit, and that the transaction in question is one of mortgage and not of sale. We do not see any reason for making a remand for further enquiry. The appeal fails and is rejected with costs.

Appeal rejected.

APPELLATE SIDE.

No. 52.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Kensington.

RAGHU MAL,—(DEFENDANT),—APPELLANT,

versus

PAT RAM,—(PLAINTIFF), }
AND OTHERS (DEFENDANTS), } —RESPONDENTS.

CASE NO. 685 OF 1907.

*Civil Procedure Code (Act XIV of 1882), Sections 213, 252, 276—
Lis pendens—Money-decree against the estate of a deceased debtor—Claim for mere money decree not an administration suit—Mortgage by heir—Rights of decree-holder and mortgagee.*

The creditor of a deceased person obtained a decree for money payable by instalments against his assets in the hands of his son and heir, the defendant in the case. Pending the appeal by the plaintiff the defendant mortgaged the property in suit which belonged to the deceased debtor to satisfy the claim of another creditor of the deceased. The plaintiff contended that the mortgage was invalid having been made pending the disposal of his case and that he could sell the property free from the mortgage lien.

Held, that the decree obtained by the plaintiff not being a decree binding the property, and his suit not being one in the nature of an administration suit, the mortgage was not invalid and the plaintiff could sell the property only subject to the mortgage. *I. L. R.*, IV Cal., 402 distinguished. *I. L. R.*, VII All., 122; *I. L. R.*, IX Cal., 406; *I. L. R.*, XXIX Mad., 508; *I. L. R.*, XXVI All., 28 approved; *I. L. R.*, XIX All., 504, *I. L. R.* VIII Cal., 20, 370 disapproved.

Further appeal from the order of the Divisional Judge, Delhi Division, dated 28th March 1907.

Mr. Shadi Lal, Advocate, for Appellant.

Messrs Ishwar Das and Chuni Lal, Pleaders, for Respondents.

JUDGMENT.

JOHNSTONE J.—(15th January 1908).—On 27th May 1904 Raghu Mal, defendant No. 2, obtained a decree for Rs. 3,059 in a suit against Bandu, defendant No. 1, on account of a debt due by Bandu's deceased father. The money was to be paid in five annual instalments out of Bandu's father's estate. Defendant No. 2 was not satisfied and so appealed to the Chief Court, which on 12th April 1907 raised the decretal amount to Rs. 6,995 and cancelled the order of payment by instalments.

One Narain Das also had a decree (for Rs. 1,600) against defendant No. 1 on account of debt due by latter's father. In 1905 he sued out execution and got two houses and some land attached; and in July, when date fixed for auction sale was approaching, defendant No. 1 applied to the District Judge not to sell by auction but to let him sell or mortgage privately and so raise the necessary sum to pay off the debt. On 30th July 1905, while the aforesaid appeal of defendant No. 2 was already pending in the Chief Court, and before any order had been passed on defendant No. 1's application to the District Judge just mentioned, defendant No. 1 mortgaged the same two houses and the same land to plaintiff for Rs. 1,700. On 2nd August 1905 the said application by defendant No. 1 was rejected, and on 3rd August the mortgage-deed was registered, Rs. 1,200 being handed to defendant No. 1 before the Sub-Registrar and Rs. 100 acknowledged as earnest money already received, while Rs. 400 was to be paid at mutation of the land. On that same day Rs. 1,150 was paid by defendant No. 1 to the decree-holder, Narain Das, who thereupon asked the executing Court to stop execution as he had given defendant No. 1 two months' grace to pay the balance of the decree. On 4th August 1905 defendant No. 2, alleging that the first instalment of his decree aforesaid had not been paid in time, sued out execution of his decree as it stood, without prejudice to his appeal then pending in the Chief Court, asking for attachment of the land and two houses aforesaid, whereupon plaintiff lodged an objection on the strength of his mortgage. The objection was disallowed, and then plaintiff filed the present suit in which he asks for a declaration that the said land is not liable to attachment and sale under the decree of defendant No. 2 except subject to plaintiff's lien as mortgagee.

The defence put in is two-fold. It is contended that the mortgage to plaintiff was without consideration and fictitious, being a fraudulent attempt to protect the property against the creditor, defendant No. 2; and that, inasmuch as defendant No. 2's decree was against the estate of defendant No. 1's father, it bound that estate, which therefore defendant No. 1 had no power to alienate or burden in any way. This second line of defence includes the doctrine of *lis pendens*; at the time of the mortgage objected to, the decree in force was that of the District Judge for Rs. 3,059, but also at that time the appeal to the Chief Court, which resulted long afterwards in a decree for Rs. 6,995, was pending, and this decree also, it is contended, takes precedence of the mortgage.

The first Court held that the mortgage was genuine and for consideration, and that it took precedence over the attachment by defendant No. 2 which attachment therefore must be taken as subject to the mortgage debt.

The lower Appellate Court, when the case came before it on appeal, relying upon *I.L.R., IX Cal.*, 406 and distinguishing *I.L.R., IV Cal.* 402, dismissed the appeal of defendant No. 2 agreeing on both points with the first Court.

Defendant No. 2 files a further appeal here, contesting both findings. I have no hesitation in expressing the opinion that the mortgage must be taken to be a genuine and lawful transaction. Both the Courts below have found it so, and no sufficient cause to the contrary has been shown. The payment of Rs. 1,150 to Narain Das on the very day on which defendant No. 1 received Rs. 1,200 from plaintiff before the Sub-Registrar is a very important fact. No doubt it is *possible* that defendant No. 1 had Rs. 1,150 of his own, obtained elsewhere, and paid that money to Narain Das; but this is mere conjecture and is opposed to all natural probability. Plaintiff has fully explained how he came to have Rs. 1,200 in his possession at that time; and the rebutting evidence is worthless. Then the matter of the Rs. 400 to be paid at mutation is strongly in favour of the *bona fides* of the whole affair. A receipt for the sum, dated 25th September 1905, is on the file and is duly proved. It is contended that this receipt required registration under Section 17 (c), Act III of 1877. I do not agree, and in any case the proof of payment is ample without the receipt. On 19th August 1905 the mutation had come before a Revenue Officer for sanction, which was refused because mortgagor said the Rs. 400 had not been paid; but when later, on 29th September 1905, mutation again came up, it was sanctioned, the money

having been paid. The matter thus seems to me quite clear, there being a receipt. dated 29th July 1905, for the earnest money. And I see no force in the contention, based on *VIII Cal., L.R., 447*, that besides actual passing of consideration, we have to see whether the mortgage was *bona fide*. In such cases as the present, if consideration in full passes, the transaction is *bona fide*, whatever may have been the *motive* of the parties to it: *Cf. I. L. R., XXV Bom., 202*.

The other question is more difficult as it is not easy to reconcile all the authorities. The rulings cited are the following:—

I. L. R., IV Cal., 402 (P., C.) VIII Cal., 20; XIX All., 504, VIII Cal., 370 (at p. 374). Quoted by appellant's counsel; and,

I. L. R., IX Cal., 406, XXVI All., 28, XII Bom., 217, XXIX Mad., 508; XXVI Mad., 792, VII All., 822, 68 P. R., 1895 relied upon by Mr. Ishar Das.

In *I. L. R., IV Cal., 402* two cases were dealt with. In the first the mortgage, which came into conflict with the decrees, was entered into before the institution of the suits (which were suits by widows for dower), which ended in those decrees. The mortgagee had sued and got a decree under which the mortgaged property was sold to third parties in execution; and it was held by their Lordships that the rights of those third parties were not affected by any of the proceedings in the widows suits. In the second case, however, the mortgage was entered into during the pendency of those suits, and the decision of the Court was the other way. The important thing in these cases is the nature of the claim and the decree. In the ruling their Lordships, quoting from the judgment under appeal of Mr. Justice Phear, take the decree as being a decree "directing the person in whose hands the property was "to account for it in order that it might be applied for the purpose of "discharging the debts due from" the deceased; and the view taken is that such a decree was "a decree against the property, and operative "to bind it in the hands of Najm-ud-din (the heir of the deceased), and therefore of any other person who took from Najm-ud-din "with notice of the decree or under such circumstances as to make him affected by the doctrine of *lis pendens*."

Next, I will look at *I. L. R., IX Cal., 406* in which the above ruling was considered and distinguished. A creditor of a dead man, who had left a Will directing payment of his debts and then distribution of property among heirs, got a decree which by its terms was to be satisfied

out of the assets left by the testator. Before he proceeded to execution one of the heirs mortgaged his share in 12 properties left by the testator and then the creditor aforesaid took out execution and got one of the properties sold by auction. The mortgagee then sued on his mortgage and got a decree, which, it was held, he could execute against the property sold as aforesaid. The *ratio decidendi* was that neither the Will nor the creditor's decree created a charge on the property, whereas in the Privy Council case the decree was "a decree which distinctly bound the property."

I will next consider the two *Allahabad* rulings. The ruling in the *XIX* volume of the *Indian Law Reports* is very brief. It merely follows the above mentioned Privy Council ruling, the point taken being that the decree of the creditor was a decree "which could only be executed against the assets of the husband" of the lady whose heir the creditor was. The same Court in *I.L.R., XXVI All., 28* shewed that it did not approve the earlier ruling. It found that the decree in the case in the *XIX* volume was a mere money-decree, while the decree in the Privy Council case was "in the nature of an administration decree and was operative to "property of the husband in the hands of his heirs."

In *I. L. R., VIII Cal., 370* the contest was between creditors of a deceased Muhammadan and persons who had purchased at auctions under the decrees obtained by those creditors on the one hand, and two married sisters of the deceased on the other who were under Muhammadan Law joint heiresses to his estate along with the widow and daughter, against whom alone the aforesaid decrees had been obtained. The sisters sued for their share of the property after the sales had taken place. It was held that the suits of the creditors must be looked upon as *administration suits* and not as mere money-suits. This ruling seems to me hardly in accord with that in *I. L. R. IX Calcutta*.

In *I.L.R. VIII Cal., 20* the judges founding upon the Privy Council ruling explained above, held that where, in execution of a money-decree against the heirs of a deceased Muhammadan for a debt due by him to a creditor, A. had purchased certain property, which had been allotted to the widow in lieu of her dower and her share in the estate, but before the purchase the widow had mortgaged it to B. and it was not shewn that in the hands of the heirs there were not assets to satisfy the said debt, B. suing on his mortgage could recover. But this was dissented from in *I.L.R., VII All., 822*. At page 845 the opinion is given that the

Calcutta rule is not good law and that every suit by a creditor of a deceased person to recover money out of the deceased's estate is not in the nature of an administration suit.

In *I. L. R., XII Bom*, 217, which, it seems to me was decided on a ground which renders it hardly in point here, the Court observed that in the Privy Council case above mentioned the decree "directed an account to be taken." This is clearly correct.

In *I. L. R., XXIX Mad.*, 508 the suit was for maintenance arrears by a widow and it was expressly asked that the decree be a charge on the property. It was held that, as maintenance was a charge on the property, it took precedence of the other party's claim based on an alienation made *pendente lite* of the widow.

I. L. R., XXVI Mad., 792 is only indirectly in point, and I do not think I should burden this judgment with an explanation of it. A similar remark may be made as regards 68 *P. R.*, 1895.

In the present case the suit was against the heir of a deceased Muhammadan on account of a debt incurred by his father; but I cannot see that it was a suit for a decree which was to bind the property as such. Much less can I see that it was an administration suit. I would refer to Section 213 and Section 252, Civil Procedure Code, perusal of which seems to me to make the case clear. Reading Section 213, which is concerned with administration suits, it seems to me that in such suits we have a plaintiff, who may be an ordinary creditor of deceased no doubt, asking the Court to take charge as it were of the deceased's estate, and to reduce it to a liquid state, and then to pay off all claims, including that of plaintiff in so far as the law set forth in the section may permit. I am unable to see any resemblance between such a suit and the suit of defendant No. 2 in the present case. Here defendant No. 2 alleged that deceased owed him so many rupees and that deceased's property had come to his son, defendant No. 1, and he asked the Court to give him a decree for those rupees. The case really comes under Section 252, Civil Procedure Code, whether defendant No. 2 used all the phraseology of that section, or whether he merely prayed that his claim be met from the deceased's property. This seems to me clear from the wording and construction of Section 252, which runs thus—

"If the decree be against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the

“*property of the deceased*, it may be executed by the attachment and sale
“of any such property :

“If no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such
“property of the deceased as is proved to have come into his possession,
“the decree may be executed against the judgment-debtor to the extent
“of the property not duly applied by him, in the same manner as if the
“decree had been against him personally.”

This is undoubtedly the kind of suit defendant No. 2 filed, and in the section I can find no suggestion of any power to follow the property of the deceased into the hands of third parties. Indeed, the drift of the section is all the other way : if the property has gone out of the hands of the defendant heir, and it is not clear that he has “duly applied” that property, then the plaintiff creditor has his remedy not against the property in the hands of *bona fide* alienees for value but against the judgment-debtor heir himself.

Thus, *I. L. R.*, *IV Cal.*, 402 is easily distinguishable : there the suit was one of the nature of an administration suit, inasmuch as it asked for a decree directing an account to be taken. I fully approve of *I. L. R.*, *IX Cal.*, 406. I do not approve of *I. L. R.*, *XIX All.*, 504, but rather of *XXVI All.*, 28. I disapprove of *I. L. R.*, *VIII Cal.*, 370, and also of the ruling at page 20 in same volume, while I concur in *I. L. R.*, *VII All.*, 822. The ruling in *I. L. R.*, *XXIX Mad.*, 508 commends itself to me as sound ; but there the express finding is that the widow’s maintenance is a charge on her husband’s estate.

In some of these cases (*e.g.*, the Privy Council case) the suit was by a Muhammadan widow for dower, but I cannot see that this is matter of distinction. Dower is a debt merely, and counsel on both sides admit that it has no special preference over other debts.

The result is that I would dismiss the appeal, with costs to plaintiff respondent.

KENSINGTON, J. (22nd January, 1908).—I agree.

Appeal dismissed.

APPELLATE SIDE.

No. 53.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

AJUDHIA PERSHAD AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

AHSAN-ULAH,—(PLAINTIFF),—RESPONDENT.

CASE No. 902 OF 1903.

Custom—Pre-emption—Market price—Good faith—Burden of proof.

Held, that before a Court proceeds to assess market value in a pre-emption case and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith.

When the consideration for a sale was an old debt, most of which was interest and the land sold was not the vendor's only assets and he did not appear to be insolvent and it was not intended by the sale to wipe off vendor's all liabilities to the vendee—

Held, that under the circumstances there was no bad faith in the matter and the pre-emptor must pay the full consideration for the sale to the vendee to get possession of the land sold.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 17th June, 1903.

The Hon'ble Mian Muhammad Shah Din, Khan Bahadur, and Mr. Ganpat Rai, Advocates, for Appellants.

Pandit Sheo Narain, Pleader, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(14th March 1906).—This is a pre-emption suit, the land sold being described as 449 *bighas* odd *kham* or 150 *bighas pukhta*. The price stated in the deed being Rs. 4,000, the first Court gave plaintiff a decree for possession on payment of Rs. 3,800. The plaintiff having appealed for a reduction of the figure and defendants having filed cross-objections, the learned Divisional Judge rejected the latter and, accepting the appeal, reduced the price to be paid to Rs. 1,621-14-0 making a calculation on the basis of Rs. 10-13-0 *per bigha pukhta*, which was apparently the average rate of a number of sales reported by the *Patwari* at time of settlement.

Defendants, vendees, now appeal and ask this Court to raise the figure again to Rs. 3,800.

It has been laid down over and over again that before a Court proceeds to assess market value in pre-emption cases and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the

deed was not fixed in good faith. Here the price stated in the deed is made up of Rs. 1,300 principal, *i.e.*, hard cash, *plus* Rs. 2,700 interest.

Three rulings have been quoted in connection with this matter of the assessment of price to be paid in pre-emption cases, *viz.*, *Phumman. Mal v. Keman*, 75 P. R., 1901⁽¹⁾, *Vir Bhan v. Mattu Shah*, 77 P. R., 1901, and *Nanak Chand v. Ram Chand*, 68 P. R., 1902⁽²⁾. In the first of these cases the learned Judges said that the law of pre-emption, though it does operate to keep down the price of property to some extent by hampering transfers, is not intended to have that effect but merely aims at protecting the prior rights of purchase of certain persons on specific grounds, and as it stands cannot be interpreted to deprive the owner of the right to make the most he can of his property, and there is nothing improper to demand or to pay a price much above the market-value. Therefore, they continued, in a case for pre-emption, where the price entered in the deed of sale, though considerably above the market-value was not shewn to be fictitious, and where there was no proof nor indication that any portion of it was refunded or otherwise appropriated it must be held that the price was fixed in good faith. In *Nanak Chand v. Ram Chand*, 68 P. R., 1902⁽²⁾ the above ruling was quoted and generally approved, and the Division Bench held that the law of pre-emption does not allow pre-emptor to take objection to a price actually and genuinely paid on the ground that it is a fancy price, the market-value being no test of what should be paid by a pre-emptor until the price mentioned in the deed is shewn to have been fixed not in good faith. It was also held that the motive which prompted a vendee to pay a fancy price was immaterial.

In *Vir Bhan v. Mattu Shah*, 77 P. R., 1901 it was laid down that in a case for pre-emption, where the transfer was in satisfaction of old debts, if the market-value of the property does not appear to differ very materially from the amount of the debts due by the vendor, and the price actually paid is the cancellation of all the liabilities mentioned in the deed, the price so paid may be held to have been paid in good faith; but that where the disparity between the market-value of the property and the sum in satisfaction of which it has been accepted is very great, and the debtor is clearly insolvent, and the property was practically the debtor's only asset, the market-value of the property is the proper test of what the pre-emptor should pay.

This ruling rather turns the flank of the law than actually grapples

(1) s. c., 123 P. L. R., 1901.

(2) s. c., 99 P. L. R., 1902.

with the difficult question of the meaning of the words "good faith" in clause (c), Section 16, Punjab Laws Act, but the case is so different from the present one in several particulars that it is no guide for us here. Here the debt up to Rs. 3,800 at least is genuine, though most of it is interest. Then there was actually a mortgage for Rs. 2,000 in October 1892, a sum larger than what the learned Divisional Judge has allowed as the proper price. The land is not the vendor's only asset by any means and he is not apparently insolvent. Nor was it the intention to wipe off all vendor's liabilities to vendee, for the item of Rs. 1,280 in the deed is only part of a decretal sum of Rs. 1,800 and the remainder Rs. 520, it is understood, remained due. Thus, there seems to have been a sort of adjustment of value in a manner to suit vendor and vendee and not a wholesale wiping out of all debts, however much they might be in exchange for the land.

In these circumstances we are unable to see where "bad faith" comes in, and we accept the appeal and, setting aside the decree of the lower Appellate Court, give plaintiff a decree for possession by pre-emption on payment of Rs. 3,800, as directed by the first Court, the money to be paid within three months. On default, the suit to stand dismissed with costs. Otherwise parties to bear their own costs in the first Court, but plaintiff to pay vendee's costs in Divisional and Chief Courts.

Appeal allowed.

REVISION SIDE.

No. 54.

CRIMINAL.

Before Mr. Justice Robertson.

LACHHMAN DAS,—(CONVICT),—PETITIONER,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 97 OF 1907.

Penal Code (Act XLV of 1860), Section 423—Fraudulent execution of deed to stave off pre-emption suits.

The accused executed a fictitious sale deed in favour of another person to stave off pre-emption suits by parties entitled to the right of pre-emption.

Held, that the accused was guilty of an offence under Section 423 of the Indian Penal Code.

Petition for revision of the order of Moulvi Inam Ali, Sessions Judge, Shahpur Division, dated 3rd January, 1907.

Mr. Nanak Chand, Advocate, for Petitioner.

Mr. Petman, Assistant Legal Remembrancer, for Respondent.

JUDGMENT.

ROBERTSON, J. (18th April 1907).—This is an application for revision in a somewhat unusual case. The facts which are found and must be accepted are as follows :—

One Lachhman Das, a Sahukar Khatri, purchased certain land from one Sultan Bibi on 24th March, 1900. Hearing the suits for pre-emption were pending, Lachhman, on 22nd March, 1901, sold the land by registered deed to one Ismail, who had, or was, believed to have a right of pre-emption superior to that of the intending pre-emptors. A suit for pre-emption was actually commenced on 23rd April, 1901 and in that Lachhman pleaded the sale to Ismail. That suit failed for various causes, not being tried on the merits, and when Ismail sought mutation of the land in his name, Lachhman urged that the whole transaction of sale to Ismail was fictitious and entered into solely to defeat the pre-emptor's claim. This is an application for revision, and I must deal with it on the basis that the sale by Lachhman to Ismail was in fact a fictitious sale, executed for the purposes of defeating a suit for pre-emption. It was, therefore, clearly fraudulent and dishonest and constituted an offence under Section 423, Indian Penal Code, for in the first place it is found as a fact that no consideration passed, although Rs. 300 was stated to have passed, and that it was not in fact intended for the benefit of the nominal purchaser, Ismail. The general principles to be applied are laid down in *Gurditta Mal v. The Emperor of India*, 10 P. R., 1902 (Cr)⁽¹⁾. No doubt such fraudulent transactions are frequently resorted to, to defeat claims for pre-emption, and possibly it is not always realized that they render the perpetrators liable, as they do, to prosecution and punishment under Section 423, Indian Penal Code. A mere nominal punishment will not meet the case, but, under the circumstances, I think it will be sufficient to maintain the conviction, and the sentence will be reduced to one of Rs. 100 fine or six weeks' rigorous imprisonment, the sentence of substantive imprisonment being reduced to the amount already undergone. The petitioner may be discharged from bail.

(1) s. c., 75 P. L. R., 1902.

REVISION SIDE,

No. 55.

CRIMINAL.

Before Mr. Justice Kensington.

RAM SINGH—(CONVICT),—PETITIONER,

versus

THE CROWN—(PROSECUTOR),—RESPONDENT.

CASE No. 404 OF 1907.

Criminal Procedure Code (Act V of 1898), Sections 367, 424—Judgment of Criminal Court on appeal. Content of—Reformatory Schools Act (VIII of 1897), Section 16.

Section 16 of Act VIII of 1897 does not relieve an Appellate Court of the duty of seeing whether a conviction or sentence is legally maintainable.

Held, that the judgment of the Appellate Court in the following words did not comply with the requirements of sections 367 and 424 of the Criminal Procedure Code.

"I find no reason to interfere and no ground of appeal requires particular notice. This appeal is dismissed."

Petition for revision of the order of F. T. Dixon, Esquire, Sessions Judge, Amritsar Division, dated 14th December, 1906.

JUDGMENT.

KENSINGTON, J. (25th April 1907).—The circumstances of this case are as follows :—

The Magistrate by whom the petitioner was tried appears to have thought him guilty of an offence under Section 240, Indian Penal Code, but did not formally convict him under that or any other section. He merely referred the case to the District Magistrate under Act VIII of 1897, with reference apparently to Section 31 (4) of the Act.

The District Magistrate treated the case as a reference under Section 9 (1) of the Act and sentenced the petitioner to a year's imprisonment without mentioning the section of the Indian Penal Code under which this sentence was awarded. He then dealt with the petitioner under the Reformatory Act.

The petitioner appealed to the Sessions Judge against the conviction and sentence. Nearly the whole of the very brief order, dated 14th December, 1906, of the Sessions Judge merely discusses the question of the propriety of the course taken under Act VIII of 1897, though Section 16 of that Act expressly precludes Courts of either appeal or revision from interfering on the point. He disposed of the appeal in these words at the end of his order :—

"I find no reason to interfere and no ground of appeal requires particular notice. This appeal is dismissed."

I must hold that this judgment does not sufficiently comply with the provisions of Section 424 and Section 367, Criminal Procedure Code. The Sessions Judge has not applied his mind to the real grounds of appeal before him or considered any of the points which obviously have to be dealt with in the case of prosecution of a child under eleven years of age, whether his conviction be taken to be under Section 240 or Section 241, Indian Penal Code. Section 16 of Act VIII of 1897 does not relieve an Appellate Court of the duty of seeing whether a conviction or sentence are maintainable.

A copy of this order will be sent to the Sessions Court with directions to re-admit the appeal and dispose of it by a judgment in accordance with law after giving fresh notice.

Petition allowed.

REVISION SIDE.

No 56.

CRIMINAL.

Befor Mr. Justice Johnstone and Mr. Justice Lal Chand.

WALIDAD *alias* WALYA—(CONVICT),—PETITIONER,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 562 OF 1907.

Penal Code (Act XLV of 1860), Sections 443, 447, 457, 511—House-breaking by night—Attempt—Going to the roof of a house with a stick and an instrument used for house-breaking.

Held, that a person who goes at night on the roof of the house of another person with a stick and an instrument used for house-breaking is guilty of an house trespass under Section 447 of the Indian Penal Code and not of an attempt to commit house-breaking by night, an offence punishable under Sections 457 and 511 of the Code.

Petition for revision of the order of W. Chevis, Esquire, Sessions Judge, Sialkot Division, dated 9th March, 1907.

Pandit Jowala Pershad, Pleader, for Petitioner.

ORDER OF REFERENCE TO DIVISION BENCH.

CHATTERJI, J. (20th June, 1907.)—In this case the accused was found on the roof, understand, of the complainant, and after striking at him with a stick had a struggle with him and jumped into the yard

of a neighbouring house. He dropped the stick and a *sandhera* or house-breaking implement in the course of the struggle.

The accused has been convicted under Sections $\frac{457}{511}$ and sentenced to two years' rigorous imprisonment. It is argued that there was only a preparation and not an attempt of house-breaking, and *Alla Bakhsh v. The Empress*, 9 P. R., 1887 (Cr.), is quoted in support of the contention. I am somewhat doubtful whether that ruling is exactly applicable, but I refer the question to a Bench.

JUDGMENT OF THE DIVISION BENCH.

LAL CHAND, J. (6th August 1907).—The facts of this case are stated in the referring order. The question is whether on the facts found the petitioner was rightly convicted of an attempt at house-breaking. The matter is not entirely free from doubt, but on very similar facts the accused in *Alla Bakhsh v. The Empress*, 9 P. R., 1887 (Cr.) was found to be guilty and convicted of mere criminal trespass. All that is proved in the present case is that the petitioner accused was found on the roof of the complainant armed with an implement used for the purpose of committing burglary. There is no evidence to show that he had either commenced to dig a hole on the roof for the purpose of effecting his entrance inside the room or had otherwise commenced any act for jumping or getting into any portion of the premises. Under the circumstances his mere presence on the roof of the house cannot be construed into an attempt to commit an offence under Section 511, Indian Penal Code. In order to apply Section 511, Indian Penal Code, it is necessary not merely that there should be an attempt to commit an offence, but likewise that an act was done as such attempt towards the commission of the offence. Mere passing on the roof of the house cannot in any sense be termed an act towards the commission of the burglary. It is an act of approach towards the house for the purpose of stealthily effecting an entrance into the premises, but can hardly be said to exceed the limits of mere preparation. While on the roof the accused had yet time to make up his mind to recede or attempt an entrance, according as he found his opportunity or the state of vigilance inside the premises. It cannot be said that by his presence on the roof of the house he had finally committed himself to committing the offence of house-breaking. We, therefore, hold that the petitioner ought to have been convicted of mere criminal trespass under Section 447, Indian Penal Code, and not of an attempt to commit house-breaking under Sections $\frac{457}{511}$ and we alter the conviction ac-

cordingly. The accused has already undergone the maximum amount of imprisonment awardable under Section 447, Indian Penal Code. We, therefore, direct his immediate release from the jail.

Conviction altered and sentence reduced.

APPELLATE SIDE.

No 57.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

SANDHE KHAN—(PLAINTIEF),—APPELLANT,

versus

BHANA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1032 OF 1906.

Vendor and purchaser—Personal covenant Indemnity against disturbance to vendee does not enure for the benefit of pre-emptor.

A condition in the original deed of sale in which the vendor guarantees his title in the land solely to the original vendee, and in which he agrees to compensate that vendee if disturbed is one which does not enure for the benefit of the pre-emptor who succeeds in obtaining a decree for possession by right of pre-emption.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 19th July, 1906.

Mr. Muhammad Shaffi, Advocate, for Appellant.

Mr. Beechey, Advocate, for Respondents.

JUDGMENT.

ROBERTSON, J.—(28th March, 1907.)—The facts of this case are sufficiently given in the following judgment of the learned Divisional Judge :—

“The land in dispute was mortgaged by defendants Nos. 1 to 4 to one Jowahir Mal for the sum of Rs. 1,228, who sold his rights to Sandhe Khan, plaintiff, on 1st of June 1904. On 12th of December 1904 defendants Nos. 1 to 4 sold the equity of redemption to Megh Raj, defendant No. 8, for Rs. 4,700. On 19th of December 1904 Munshi and others filed a suit for the possession of $\frac{2}{3}$ ths share in the land, on the ground that defendants Nos. 1 to 4 had no right to sell their share. In this case the plaintiff was also impleaded as a defendant and he filed written pleas; while this case was pending, the plaintiff sued Megh Raj, the vendee, for the possession of the whole land by pre-emption. On 15th June 1905 Sandhe Khan compromised with the vendee, and a decree on the basis of this compromise under which he was to pay Rs. 2,472 to the

vendee was passed in plaintiff's favour. On 30th August 1905 Munshi and others' claim against Megh Raj, Sandhe Khan and others was decreed. The present suit was filed by Sandhe Khan for the recovery of $\frac{3}{4}$ ths share of the price paid by him for the land decreed in Munshi and others' favour on the ground that under the terms of the sale-deed executed by the defendants Nos 1 to 4 in Megh Raj's favour, they (the defendants were bound to recompense him for the loss that he had suffered on account of Munshi and others' decree. The lower Court, on the authority of the Chief Court Judgment reported in *Punjab Record* 24 of 1901 ⁽¹⁾, and 93 of 1902, held that the pre-emptor stood in the shoes of the vendees, and that therefore the condition as to the payment of any loss that might accrue to the vendee, on account of lack of title applied equally in favour of the pre-emptor. Defendants appeal against that order."

The only question which we have to decide is whether or not a condition in the original deed of sale in which the vendor guarantees his title in the land solely to the original vendee, and in which he agrees to compensate that vendee if disturbed is one which enures for the benefit of the pre-emptor who succeeds in obtaining a decree for possession on pre-emption.

The learned Divisional Judge held that it did not, and after carefully considering all the rulings quoted to us and the arguments put forward we agree with that view. None of the rulings quoted—*Kalu v. Bhupa*, 30 P. R., 1893, *Zahar Khan v. Mustajab Khan*, 55 P. R., 1899, *Hakim Singh v. Indar*, 46 P. R., 1902 ⁽²⁾, *Baldeo Das v. Piare Lal*, 24 P. R., 1901 ⁽¹⁾, *Bogha Singh v. Gurmukh Singh*, 93 P. R., 1902, *Gobind Dayal v. Inayatullah*, I. L. R., VII All., 775 *Durga Prasad v. Shambhu Nath*, I. L. R., VIII All., 86, *Tajammul Hussain v. Uda*, I. L. R., III All., 688, and *Ahmad Shah v. Walidad Khan*, 96 P. R., 1906, ⁽³⁾ appear to us to support the contention. They all lay down the necessity for the pre-emptor to discharge all the burdens undertaken by the original vendee. But a pre-emptor has no right to the advantage of any purely personal covenant by the vendor in favour of the vendee, which is a thing quite separable from the sale of immovable property. The pre-emptor is neither the representative of the vendor, nor the assignee of the vendee, nor has he any right of pre-emption over any personal covenant. He must take over the whole bargain as regards the immovable property in so far as his rights to pre-empt

(1) 27 P. L. R., 1901.

(3) s. c., 188 P. L. R., 1906.

(2) s. c., 49 P. L. R., 1902.

extend, and they do not extend to personal covenants such as that of indemnity included in the original sale-deed in this case. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 58

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

HAZARA AND OTHERS,—(PLAINTIFFS),—PETITIONERS,

versus

BISHEN SINGH,—(DEFENDANT),—RESPONDENT.

CASE NO. 97 OF 1907.

Civil Procedure Code (Act XIV of 1882), Section 53—Specific Relief Act (I of 1877), Section 42—Amendment of plaint—Declaratory suit—Plaintiff omitting to pray for further relief.

It is most desirable, whenever possible, that Courts should settle the dispute that has arisen between the parties, and, if necessary, plaint may be allowed to be amended.

When the appellate Court dismissed the claim on the ground that the plaintiff had omitted to pray for further relief, the Chief Court, on revision, set aside the order of dismissal and ordered re-trial of the appeal after allowing amendment of the plaint.

Petition, under Section 70 (a) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the decree of Kazi Muhammad Aslam, C. M. G., Divisional Judge, Ferozepore Division, dated the 5th June 1906, reversing that of Lala Beni Parshad, Munsif, 2nd class, Moga, dated the 22nd February 1906, decreeing the plaintiffs' claim.

Mr. Devi Dial, Advocate, for Petitioners.

Sardar Kharak Singh, Pleader, for Respondent.

JUDGMENT.

CLARK, C. J. (2nd May 1907).—Plaintiffs' suit was to have cut certain trees on plaintiffs' land, which had been sold to defendant as they were damaging plaintiffs' crop. The suit was couched in the form of a declaratory suit to the effect that defendants were not entitled to keep the trees standing on plaintiffs' land.

The first Court gave the plaintiffs a declaratory decree to the above effect, with a direction that defendant should cut the trees.

The learned Divisional Judge, Kazi Muhammad Aslam Khan, held that the suit would not lie—he said: “the plaintiffs had a consequential “relief to seek in this case, that is, a permanent injunction to restrain “the defendant to allow the trees to stand in their land and to cut them “.....as this relief was not sought the suit “for a declaration could not lie”, and he dismissed the suit.

The action of the Divisional Judge was thus instead of settling the dispute existing between the parties to render useless the whole of the litigation between the parties, and to throw plaintiff back on a fresh suit to secure the same object

It is most desirable, whenever possible, that Courts should settle the dispute that has arisen between the parties. This was done in this case by the first Court and should not have been undone by the Divisional Judge. If there was any irregularity in the first Court in not having required formal amendment of the plaint, this could have been rectified by the appellate Court.

I accept the revision and remand the case under Section 562, Civil Procedure Code, for disposal of the appeal on the merits.

Court-fee on this revision will be refunded; other costs will be costs in the case.

Petition accepted.

APPELLATE SIDE.

No. 59.

(CIVIL.

Before Mr. Justice Chatterji C. I. E., and Mr. Justice Johnstone.

BARKAT ALI,—(DEFENDANT),—APPELLANT,

versus

JHANDA, AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 732 OF 1906.

*Custom—Alienation by childless proprietor—Gift to stranger—
Reversion to lineal heirs of donor—Awans of Jullundur District.*

Held, that by custom Awans in the Jullundur District have no absolute and uncontrolled right to give away ancestral land to strangers and non-relations to the prejudice of their collateral relations, and the ordinary principle of reversion of the gifted land to the donor's line on failure of the donee's lineal heirs is applicable to them.

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Jullundur Division, dated the 14th March 1906, varying that of

T. P. Ellis, Esquire, District Judge, Jullundur, dated the 10th November 1915, dismissing the claim.

Mr. Gurcharn Singh, Advocate, for Appellant.

Pandit Sheo Narain, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J. (3rd April 1907).—This appeal and No. 660 of 1906 are cross-appeals and will be disposed of by one judgment.

The material facts are given in the judgments of the lower Courts. The parties are *Awans* of Phulpur and Kadianwali in the Jullundur *Tahsil* and District and the disputed land is situate at the latter place, while plaintiffs are landholders and residents of Phulpur. The Settlement pedigree-tables of both villages show the relationship of the plaintiffs to Roda, the original proprietor of the land, who made a gift of half of it to Jiwa, defendant's uncle.

In this appeal by the defendant the questions for decision are : (1) whether the land has descended from Ashraf, the common ancestor of the plaintiffs and Roda, (2) whether the heirs of the donor have by custom a right of reversion.

In the cross-appeal the points for determination are :—

(1) whether the plaintiffs are entitled to recover the half-share which Jiwa did not get by gift, but got possession of without title, and made over to Mahtab, his brother.

(2) whether the plaintiffs' claim to the house is established.

Taking up the defendant's appeal first we are clearly of opinion that the land is ancestral. The *qaiyat* of the Settlement pedigree of Kadianwali shows that Ashraf got it from his father-in-law, Ditta, one of the original proprietors of the village, and the plaintiffs are, therefore, entitled to claim as reversioners of Jiwa—who got one half by gift—on failure of his direct male line. It is argued on the second point that among *Awans* the power of alienation is plenary, and that therefore the principle of return of the gifted land to the agnatic relations of the donor is not applicable in the present case. We have referred to the authorities bearing on the powers of *Awan* proprietors to alienate ancestral land in their possession in the presence of agnates and the latest of them, No. 8 P.R., 1906, (1) in which the earlier rulings are cited and considered is a case from Jullundur District. We are unable to hold on these rulings and on the evidence offered in this case that an *Awan* in the Jullundur District has absolute and uncontrolled right to give away ancestral land to strangers and

non-relations to the prejudice of his collateral relations, though his powers of disposition are undoubtedly large, and we see no reason to think that the ordinary principle of reversion of the gifted land to the donor's line on failure of the donee's lineal heirs, does not apply in the present instance.

We accordingly reject defendant's appeal.

As regards plaintiffs' appeal we are unable to find any specific evidence as to the existence of the house claimed or to differ from the first Court's opinion on this point.

As regards the half share of land not gifted to Jiwa, but held by him and made over in his lifetime to his brother, Mahtab, we hold that Jiwa's possession was adverse, and that plaintiffs' right to sue accrued on Roda's death more than thirty years ago. It is too late now for plaintiffs to make any claim to this share.

The cross-appeal must also fail.

We dismiss both appeals with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 60.

CIVIL.

Before Mr. Justice Chatterji, C. I. E.

MANGLADHA,—(DEFENDANT),—APPELLANT,

*versus*LAL CHAND,—(PLAINTIFF),
AND
GHULAM,—(DEFENDANT), } —RESPONDENTS.

CASE No. 1169 OF 1907.

Mortgage—Incomplete transaction.

When the part of the mortgage-money remaining unpaid by the mortgaged consisted of a sum which the mortgagor had agreed should be withheld by the mortgagee till mutation of names, and a small sum out of that promised for expenses of the deed, and the mutation of names did not take place at all—

Held, that the mortgage could not be held as incomplete for default in payment of the mortgage-money.

Further appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 17th May 1907.

Mr. Pestonji Dadabhai, Advocate, for Appellant.

Mr. Ishar Das, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J.—(27th January 1908).—The facts are given in the judgments of the lower Courts. The first point argued is that the suit is premature in that it cannot be reasonably held that at any time before the expiration of five years from the date of the mortgage redemption can take place on payment of only three-fourths of the mortgage-money. For instance, if redemption was applied for the day after the execution of the mortgage-deed, the mortgagee would suffer great loss if he was paid only three-fourths of the mortgage-money. This is Appellant's ground for construing the deed to mean that the times for redemption are divided into four periods of five years each, during which redemption can take place on payment of the proportions of mortgage-money stated in the deed. But this necessitates a change in the language of the deed, which can be done only in very exceptional circumstances and in order to give effect to the obvious intention of the parties. The whole deed must be read together, and the better interpretation appears to be that the proportions given are illustrative and not exhaustive, and that the true meaning is that redemption is to take place on payment of money proportionate to the time that has elapsed after execution at the rates indicated in the deed.

On this view plaintiff has offered, as stated by the Divisional Judge, more than what can be due to the defendant under the terms of the deed. Appellant's contention that there can be no redemption before five years, and that the suit should be dismissed as premature, must therefore fail.

The next contention is that full consideration was not paid by plaintiff for his mortgage, and that his deed is void under the ruling of the Full Bench in No. 59 *Punjab Record*, 1907.⁽¹⁾ The matter has been discussed in some detail by the Divisional Judge, but appellant points out that plaintiff did not accept the *rukka* for Rs. 25, and stated that it had been given by his son, who was inimical to him, in order to spoil his case, and that the learned Judge has used defendant's own pleas against him.

I think, after consideration, the Judge had to decide which story is probable, and has held that upon the defendant's version which he holds is established his legal objection to the deed fails. This is quite legitimate, and I agree with his finding on the facts. Plaintiff has clearly told a lie in this respect, but this does not entail the dismissal of his suit. The result of defendant's statement is that he agreed to wait for Rs. 25 till mutation of names, which has not taken place, and got the *rukka* from plaintiff's son. He cannot therefore object that consideration has not passed in so far as Rs. 25 are concerned. Plaintiff has accepted the liability and the condition as to its payment before obtaining possession has been inserted in the decree. As regards Rs. 15 they were given for expenses of the deed, and defendant admits he has got Rs. 13, but claims the balance Rs. 2. This shows that the matter is one of account, and even if a small balance is due to defendant-mortgagor it cannot vitiate the deed. The parties understood that this would be so. This argument, therefore, must also fail.

The appeal is dismissed with costs.

Appeal dismissed.

REVISION SIDE.

No. 61.

CIVIL.

Before Sir William Clark, Kt, Chief Judge and Mr. Justice Reid.

SIRI DHAR,—(DEFENDANT),—PETITIONER,

versus

AMAR NATH, AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 1941 OF 1907.

(1) S. C., 62 P. L. R., 1908 (F. B.) at page 152 *infra*.

Court Fees Act (VII of 1870), Section 7 V (e)—Suits Valuation Act (VII of 1887), Section 3 (1). Rules under—Rule 1 (e)—Court-fee—Garden—Fruit garden.

Held, that for purposes of Court-fee and jurisdiction a fruit garden is a "garden" even though the garden land is assessed to revenue.

Petition for revision of the order of Lala Diwan Chand, District Judge, Hoshiarpur, dated 13th August 1907.

Lala Dharam Das Suri, Pleader, for Petitioner.

Mr. Duni Chand, Advocate, for Respondents.

JUDGMENT.

REID, J.--(27th January 1908).—The plaintiffs-respondents sued in the Court of a Munsif of the 1st class for possession of a fruit garden surrounded by a wall, describing it as 30 *kanals* 13 *marlas* of land assessed to revenue and valued the suit for purposes of jurisdiction at 30 years Government revenue. The defendant objected that houses and a garden worth about Rs. 8,000 stood on the land, and the Munsif appointed a Commissioner who assessed the value at more than that sum. The assessment was not objected to, and the Munsif, holding that the property in suit was a garden of value in excess of his jurisdiction returned the record to the District Judge, who originally made the case over to him, in order that the trial might be by a competent Court. The District Judge held that the property in suit was not a garden, citing *Audathodan Moidin versus Pullambath Mamally, Indian Law Reports XII Mad.*, 301, *F. B.*, and *Durga Singh versus Bisheshar Dayal, Indian Law Reports XXIV All.*, 218.

In the Madras case it was held that a fruit garden, assessed to revenue only if it contained certain trees, the assessment being on the trees and not on the land, was either a garden or land which paid no revenue, for the purposes of the Court Fees Act, and that a suit for the same was governed either by Section 7 V (c) or (d) of the Act. The Court held that, inasmuch as the word "garden" occurred in connection with the word "houses" in Section 7 V, the term referred "primarily" to a garden in the English sense, ornamental, or pleasure or vegetable.

In the Allahabad case it was held that the word "land" was used in a restricted sense in the Act inasmuch as the Act provided a distinct mode of ascertaining the amount at which the relief sought should be valued according as the subject-matter of the suit is land, or houses or gardens, and that the word did not include everything on or under the surface of the land.

We see no reason for not extending the word "garden" to a fruit garden, even though the land is assessed to revenue, just as much as to a vegetable or pleasure garden, and the Madras Court did not go further than express an opinion that the word referred "primarily" to a garden in the English sense. In Upper India generally an orchard or a collection of fruit trees is described by the word by which descriptions of gardens specified by the Madras Court are described, and Section 7 V (e) of the Act and Rule 1 (e) framed under Section 3(1) of the Suits Valuation Act are in our opinion applicable.

We allow the application, with costs of all Courts, set aside the order of the District Judge, and restore the order of the Munsif.

Petition accepted.

Full Bench:

APPELLATE SIDE.

No. 62.

CIVIL.

Before Mr. Justice Reid, Mr. Justice Robertson and Mr. Justice Lal Chand.

GOKAL CHAND AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,
versus

RAHMAN, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 616 OF 1906.

Mortgage—Incomplete transaction—Failure of mortgagee to pay mortgage-money to mortgagor or previous incumbrancer.

Held, by the Full Bench, that in the absence of a special contract to the contrary, when a mortgagee fails to pay to the mortgagor or a previous incumbrancer the whole or a portion of the mortgage-money at the time fixed for payment or within reasonable time when no time is fixed therefor, the mortgage transaction remains incomplete and the mortgagee is not entitled to any benefit under the mortgage even on payment of the unpaid mortgage-money; it is immaterial whether the non-payment has, or has not, caused inconvenience or loss to the mortgagor.—16 P. R., 1884, *dissented from*.

Further appeal from the decree of Major G. C., Beadon, Divisional Judge, Hoshiarpur Division, dated 23rd March 1906.

Mr. Harris, Advocate, for Appellants.

Mr. Bodh Raj Sawhney, Advocate, for Respondents.

ORDER OF REFERENCE.

CHATTERJI, J.—(23rd July 1906.)—In this case the consideration for the mortgage, dated 9th April 1900, was mostly money to be paid to previous mortgagees and creditor. One of these items was a sum of

Rs. 93 payable to Chanan Shah. All the mortgage-money was paid, but Chanan Shah's debt, which was secured by two deeds, could not be paid in full. One deed for Rs. 68 was paid off and the remaining amount in the mortgagees' hands, Rs. 25, was insufficient to redeem the other mortgage. The money remained with the mortgagees, and now they sue, after the lapse of about five years, for possession of the land under the terms of the deed, offering, if necessary, to pay the 25 rupees to the mortgagees.

The suit has been thrown out by the Divisional Judge on the ground that there was no complete mortgage as the plaintiffs did not pay the full amount of the mortgage-money but kept back Rs. 25 which they ought to have paid to the mortgagor, if it was insufficient to redeem the other mortgage to Chanan Shah. He has followed *Gopal Sahai v. Mussammat Hussain Bibi and others*, 100 P. R., 1889.

The rulings on the question as to the right of the mortgagee under the mortgage where for some reason or other a portion of the mortgage-money specified in the deed, remains unpaid, are conflicting. See *Alla Baksh and another v. Shama and another*, 153 P. R., 1882, *Gopal Sahai v. Mussammat Hussain Bibi*, 100 P. R., 1889 and *Saudagar Singh v. Sant Ram* 103 P. R., 1906,⁽¹⁾ on the one hand, and on the other *Gomes and another v. Mela Ram* 16 P. R., 1884, and the judgment of Mr. Justice Chitty in Civil Revision No. 355 of 1906, which, I understand, is supported by a Division Bench ruling of which I have not been able to obtain the particulars. The weight of authority is in favour of the view propounded in the first set of rulings, which is that the mortgage is in that case wholly avoided and carries no lien with it. I am myself not free from doubt as to the correctness of this opinion, and the point is an important one, which frequently comes up for decision. I regard the law on this point as in an unsatisfactory state as far as this province is concerned, and think that it ought to be clearly propounded by a Full Bench.

I accordingly refer the question to a Full Bench. It is sufficiently set out in the foregoing judgment.

I leave on record that, after hearing counsel, I overruled the grounds of appeal relating to the capacity of Rahman, respondent, to effect a valid mortgage of his minor brother's share, and hold that he has no such power, and that the minor has not in any case received full benefit from the mortgage.

(1) S. C., 87 P. L. R., 1906.

The Full Bench reference arises only in the case between Rahman and the mortgagees.

JUDGMENT OF FULL BENCH.

REID, J.—(9th February 1907.)—The question referred is the effect, on a mortgage with possession, of failure by the mortgagee to pay off the prior incumbrances, payment of which constituted part of the mortgage consideration: *Gomes v. Mela Ram* 16 P. R., 1884, and Civil Revision No. 335 of 1906 have been relied on for the appellant as authority for the proposition that in spite of failure to pay the whole consideration promptly the mortgagee was entitled, in the absence of a special contract to the contrary, to possession, the remedy of the mortgagor being a suit for damages for breach of the contract to pay the consideration. Elsmie, J., who was a party to the judgments in *Ala Bakshah v. Shama*, 153 P. R., 1882, and *Gomes v. Mela Ram*, 16 P. R., 1884 distinguished the latter case from the former on the ground that in the latter there was no contract as to the time for payment, and tender of the unpaid balance was made within a “*prima facie* reasonable time.”

Plowden, S. J. drew no such distinction, and held that failure to pay promptly afforded no defence to a suit by a mortgagee for possession, coupled with tender of the consideration due. In Civil Revision 335 of 1906 Chitty, J. distinguished the facts from those in *Gopal Sahai v. Mussammat Hussain Bibi*, 100 P. R., 1889, in that the mortgagee in the 1906 case undertook to pay off certain prior incumbrances and the amounts so payable were not to pass through the mortgagor's hands, and no time was fixed for these payments. The learned Judge held that the mortgagors could not plead that the mortgage was incomplete merely because the prior incumbrances had not been paid off, and they had themselves paid some of them. I regret that I am unable to concur in these expositions of the law. Prior incumbrancers are not bound by the contract between the mortgagor and a puisne incumbrancer, and the failure of the latter to pay off prior incumbrances exposes the mortgagor to the risk of suits by prior incumbrancers. In my opinion the rule applicable is the same whether payment to the mortgagor or to a prior incumbrancer is contracted for. In either case the mortgagor is entitled to prompt payment, and failure to pay promptly avoids the mortgage. The rule contended for by counsel for the appellant would deprive the mortgagor of the benefit to be derived by him from the mortgage, *viz.*, the realisation of money or the freedom from the claims of prior

incumbrancers; and, in my opinion, the mortgagee cannot put the mortgagor to the risk of inconvenience by delay in payment without losing the benefit of his contract and his right to possession. The mere undertaking to pay a third party does not constitute payment, *Ala Bakhsh v. Shama*, 153 P. R., 1882, and *Chandon Lall v. Nihal*, 153 P. R., 1882, *Mangal Singh v. Jindan*, 27 P. R., 1886, *Gopal Sahai v. Mussammatt Hussain Bibi*, 100 P. R., 1889, *Saudagar Singh v. Sant Ram*, 103 P. R., 1906,⁽¹⁾ are authority for the conclusion that delay in payment, either to the mortgagor or to a prior incumbrancer, after such payment has been demanded by the mortgagor, avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, in the absence of a specific contract postponing payment, it being immaterial whether the delay has or has not caused inconvenience or loss to the mortgagor. This is my answer to the reference, and the result admittedly is that the appeal fails and is dismissed with costs, no other point having been left undecided by my brother Chatterji, who made the reference.

ROBERTSON, J.—(12th February 1907).—I agree in the reply to the reference. There may be cases in which the consideration for a mortgage is, in whole or in part, an undertaking on the part of the mortgagee to take the discharge of prior incumbrances on his shoulders. In such a case the result might be different. But where the consideration is cash and a certain portion of the money is left with the mortgagee for prompt payment to a third person, failure to pay such sum within a reasonable or specified time, in my opinion, avoids the mortgage. With these remarks I concur in the reply of my brother Reid to the reference.

LAL CHAND, J.—(13th February 1907).—I agree that failure to pay the consideration money as agreed upon, whether to the mortgagor or to a prior incumbrancer, avoids the mortgage. I further consider that in the absence of any express and direct stipulation in the deed of mortgage postponing payment for a specified time it will be presumed that payment is intended to be made immediately or within a reasonable time, according to the facts and circumstances of each particular case. With these remarks I concur in the answer given to the reference by my learned colleagues and in dismissing the appeal with costs.

Appeal dismissed.

(1) s. o., 87 P. L. R., 1906.

Full Bench.

APPELLATE SIDE.

No. 63.

CIVIL.

*Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid and
Mr. Justice Chatterji C. I. E.*

GHULAM MUSTAFA,—(DEFENDANT)—APPELLANT,

versus

**SHAHAB-UD-DIN KHAN—(PLAINTIFF) } —RESPONDENTS.
AND ANOTHER—(DEFENDANT) }**

CASE No. 81 OF 1907.

*Limitation Act (XV of 1877), Schedule II, Article 10—Limitation—
Pre-emption suit—Property in suit in possession of tenant—Property
capable of physical possession.*

*Held, that property in the possession of tenants cannot be said to be capable
of physical possession within the meaning of Article 10 of second schedule of the
Limitation Act. P. R., 88 of 1905, s. c., 179 P. L. R., 1905 explained, I. L. R.,
XXIV All. 18 (P. C.), 16 P. R. 1902, 73 P. R. 1885, 48 P. R. 1884 followed.*

*Further appeal from the order of Major G. C. Beadon, Divisional Judge,
Hoshiarpur Division, dated the 22nd October 1906.*

Messrs. Grey and Shadi Lal, Advocates, for Appellant.

Mr. Gokal Chand, Advocate, for Respondents.

ORDER OF REFERENCE.

LAL CHAND & RATTIGAN, J J.—(13th April, 1907)—This is an appeal in a suit for pre-emption, and the sole point raised in the grounds of appeal is that the suit is barred by limitation. The sale sought to be impeached was effected and registered on 7th April 1905. The suit was instituted on 10th April 1906, i.e., after the expiration of one year from the date on which the sale-deed was registered. It is found that the land sold consists of specified fields in possession of tenants. According to the sale deed it was agreed that the vendor shall receive the *Chakota* for the current *Rabi*, and it is found that, as a matter of fact, the vendee obtained actual possession from the tenants after the *Rabi* crop was harvested.

The lower Appellate Court, following *P. R. No. 88 of 1905* (1), has held that the lands sold did admit of physical possession, and as the suit was instituted within one year from the date when such possession was taken, it was not barred by limitation. If the subject-matter of sale, (though in actual possession of tenants at the time of sale) did admit of physical possession, then the view taken by the

(1). s. c. 179 P. L. R., 1905.

learned Divisional Judge, following *P. R.* No. 88 of 1905⁽¹⁾ would be correct. In *P. R.* No. 88 of 1905⁽¹⁾ the property sold consisted of shops, which were found to be in possession of tenants at the time of sale, and it was presumed that the property sold admitted of physical possession. The property sold in the present case consists of specified fields of land in possession of tenants. But a difference in the class of property appears to be altogether immaterial for the purpose of interpreting and applying Article 10 of the Limitation Act. The two cases therefore are so far very much similar and scarcely distinguishable in principle. In view, however, of the authorities noted below* it appears extremely doubtful, whether property sold, be it a house, shop or specified plot of land, can be held to admit of physical possession within Article 10, if when sold it was in personal possession of a tenant and not its proprietor. The judgment in *I. L. R.*, XX All., 315 Full Bench was confirmed on appeal by their Lordships of the Privy Council in *I. L. R.*, XXIV All., 18; and XXVIII All., 424 merely follow the view already propounded in *I. L. R.*, XX and XXIV All. The Privy Council judgment in *Batul Begum* versus *Mansur Ali Khan*, referred to in *P. R.* No. 88 of 1905⁽¹⁾ as quoted from *V Calcutta Weekly Notes* 888, is apparently the same case as is reported in *I. L. R.*, XXIV All., 17 (P. C.). The judgment quoted and relied upon by the learned judges as showing that possession of a tenant is not physical possession but only constructive on behalf of the owner, whereas just opposite seems to be the conclusion deducible from the judgment of their Lordships of the Privy Council. Their Lordships in that case defined "physical possession" to mean "personal and immediate possession," and applying this definition a property held at the time of sale by an owner through tenants would not appear to admit of physical possession. This was in fact the view held in *P. R.*, No. 73 of 1885, though it is quoted and referred to in *P. R.*, No. 88 of 1905⁽¹⁾ as supporting the opposite conclusion. The point of limitation involved in this appeal is not altogether free from difficulty, and it appears questionable whether the Privy Council judgment in *Batul Begam v. Mansur Ali* and the judgment of this Court in *P. R.*, No. 73 of 1885 were correctly applied in *P. R.* No. 88 of 1905⁽¹⁾. We, therefore, refer the appeal to a Full Bench for disposal.

JUDGMENT OF THE FULL BENCH.

CHATTERJI, J.—(29th November 1907).—The material facts as well as the point which the Full Bench is asked to decide in disposing of

(1) s. c., 179 *P. L. R.*, 1905.

* *I. L. R.*, XX All., 315 (F. B.); *I. L. R.*, XXIV All., 17 (P. C.); *I. L. R.*, XXVIII All., 424; *P. R.*, 73 of 1885.

this appeal are set forth in the referring order of the Division Bench and need not be recapitulated here.

In No. 88 P. R., 1905⁽¹⁾ the property in suit consisting of three shops with a *balakhana* above were in the possession of three tenants, who on the date the sale took place, attorned to the purchaser by executing leases in his favour. It was contended by the latter, when the suit for pre-emption, in which the appeal was carried to this Court, was brought, that he had taken possession on the date of sale, and that claim, which was brought more than a year after the expiration of a year from that date, was barred by time under Article 10 of the Limitation Act. It was decided, following several decisions of chartered High Courts and this Court as well as a judgment of the Privy Council, that mere attornment by a tenant does not confer physical possession of the property held by him so as to start limitation against the pre-emptor. This was quite correct and is supported by the authorities cited. But in the beginning of that part of the judgment which disposes of limitation the remark occurs: "The property clearly admits of physical possession," from which it may be inferred that where the property sold is in possession of tenants who attorn to the purchaser it is to be regarded as capable of physical possession, though it is not clear that the judges ever adverted to this consequence. The learned Divisional Judge has so understood the ruling in applying the limitation in this case, the property in suit being held to be of that description, though it is land held under a written lease, and the defendants contend that this view is erroneous and is not supported by the authorities which the Chief Court judgment purposes to follow. Their Lordships of the Privy Council in *Batul Begum versus Mansur Ali Khan, etc.*, I. L. R. XXIV All., p. 17 (P.C.) held that the words "physical possession" in Article 10 of the Limitation Act mean "personal and immediate possession." The case related to a mortgage and is not otherwise in point, but this interpretation of the phrase in the Article in question is most valuable and authoritative and must be borne in mind in considering other cases of pre-emption.

In *Kaunsilla Kunwar versus Gopal Prasad, etc.*, I. L. R., XXVIII All., p. 424 the interpretation of their Lordships of the Privy Council was held to be applicable to property held by tenants, which was accordingly decided to be not capable of physical possession. The same view was taken by this Court in No. 16 P. R. 1902.⁽²⁾

(1) s. c., 179 P. L. R., 1905.

(2) s. c., 15 P. L. R., 1902.

There are several older rulings of this Court to the same effect, *e.g.*, Nos. 73 *P. R.*, 1885, 48 *P. R.*, 1884 and the *dictum* at page 283 in 97 *P. R.*, 1880.

These constitute a formidable weight of opinion in favour of property in possession of tenants being held to be property that does not admit of "physical possession," and the interpretation by the Privy Council concludes the question of construction of those words.

In our opinion the words "capable of physical possession" should be construed with reference to the time of sale, and has nothing to do with the question whether physical possession is easy of attainment or otherwise, or with the nature of the obstruction to the taking of such possession. A tenant-at-will or by sufferance can no doubt be ejected with less difficulty and personal possession taken, whereas if the property is under mortgage or joint property, it would take much time and trouble to reduce it to such possession. But these matters are not within the contemplation of Article 10. It simply has regard to the question whether the property sold is capable of immediate and personal possession as soon as the sale is effected, and if it is not, the property does not admit of physical possession. Now property held by a tenant-at-will or by sufferance cannot be so taken possession of until the tenant is removed, and attornment to the purchaser is not enough to satisfy the words of the Article. It follows, therefore, that such property does not admit of physical possession within the meaning of the first part of the Article and to this extent the *dictum* in No. 88 *P. R.*, 1905⁽¹⁾ is overruled. The second part of Article 120 would apply to such cases according as there is a registered deed of sale or not.

We hold, therefore, that the property in dispute in this case did not admit of physical possession at the date of sale, and that limitation therefore began to run under the second clause of Article 10 from the date of registration of the deed of sale. Plaintiff's suit had been filed more than a year after that date and is barred by time. The mistake made in the copy he obtained from the Registration office does not save his right.

We accept the appeal and dismiss the suit with costs in all the Courts.

Appeal allowed.

(1) *s. c.*, 179 *P. L. R.*, 1905.

APPELLATE SIDE.

No. 64.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Johnstone.

HARIA,—(PLAINTIFF),—APPELLANT,

versus

KANHAYA, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 904 OF 1904.

*Custom—Hindu Law—Marriage of a Rajput with a Khatrani, validity of—Burden of proof—Evidence of marriage—Treatment as wife—Bhadiar.**Held*, that under Hindu Law, the marriage of a *Rajput* with a *Khatrani* woman is not invalid* and that the defendants, on whom the *onus* lay, had failed to establish any custom to the contrary among *Bhadiar Rajputs* of Kangra District.*Where* it was alleged that the marriage in dispute took place more than fifty years ago, and it was shown that the woman was recognised as married wife and her son as legitimate issue by the alleged husband.—*Held*, that under the circumstances of the case the marriage must be held as proved.*Further appeal from the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 17th June 1904, reversing that of Raja Narindar Chand, Honorary Civil Judge, Nadaun, dated the 31st August 1903, decreeing the claim.**Rai Sahib Lala Sukh Dial*, Pleader, for Appellant.*Mr. Roshan Lal*, Advocate, for Respondents.

JUDGMENT.

CHATTERJI, J.—(27th November 1907).—The material facts are briefly these. One Desu, a *Bhadiar Rajput*, had two sons, (1) Lehna, by a *Rajput* wife, and (2) Haria, by a *Khatrani* woman, who is also said to have been married to him. Desu had land in villages Tappa and Jalari.

On 10th May 1878 Desu executed a deed of gift giving the Tappa land to Lehna and the land at Jalari to Haria. Lehna sued to cancel the gift on the allegation that Haria was a *sartora* son, *i. e.*, illegitimate, while he was Desu's son by a *Rajput* wife. The Court ultimately held that Haria's rights were inferior to that of Lehna as he was the issue of a woman who was not a *Rajput*. It declared Lehna to be entitled to an equal share in the Jalari land with Haria in addition to the land at Tappa. This decision was in accordance with a writing which embodies a settlement by the parties and is attested by certain of the *panches* or intermediaries through whom apparently it was made. In *Sambat*,

1952 or 1895 Desu executed a document recognizing Haria, plaintiff, as his heir, and providing that after his death his wife *Mussammât* Kubjan and Haria would hold their lands together, but in case of dispute divide it. This document refers to another of 1943, which was probably of the same purport. The first Court found that it was acted upon during Desu's life-time and for some time after his death. Subsequently *Mussammât* Kubjan sold some plots of her husband's land, and Haria sued for a declaratory decree in respect of one of the sales, which, however, appears to have been maintained in consequence of Haria and the vendee having come to terms. Finally, on 3rd November 1902, *Mussammât* Kubjan sold the land in dispute to Kanhaya and Khazana, respondents, who are sons of Desu's brother Ladu, and plaintiff has brought the present suit to have it declared that the sale will not affect his reversionary rights.

The defendants-vendees pleaded that they, the collaterals of Lehna, were the next heirs and not the plaintiff, who, as the *sartora* or illegitimate son of Desu by a woman of another caste, had no right of reversion after the widow's death. They also said that the sale was for valid necessity, but this was decided against them by the first Court, and has not been discussed by the Divisional Judge, nor argued before us and need not therefore be further considered.

The first Court found that plaintiff was Desu's son by a mistress, but nevertheless decreed the claim. The grounds for decision are not very clear, but apparently it thought that the agreement of 1952 by Desu gave plaintiff the right of reversion.

On appeal the Divisional Judge remanded the case for further inquiry on two points :—

1. Whether the custom applicable to the parties does or does not recognize as a valid marriage a union between a *Rajput* and a woman of another caste.
2. Whether or not the male issue of such a union is excluded from succession by the father's collateral relations.

The return of the first Court was against the plaintiff on both points. The Divisional Judge thereupon found that the issue of a *Rajput* by a woman of another caste is designated "*sartora*" and that according to the *Riwaj-i-am* and certain precedents cited in the judgment, a *sartora* son has no right of inheritance, but merely one of main-

tenance. He accordingly accepted the defendants' appeal and dismissed the suit.

The points for determination in this appeal appear to be :

1. Whether there was a marriage between plaintiff's mother and Desu.
2. Whether plaintiff's mother, having been a woman of a different caste from Desu, *i. e.*, not a *Rajput*, the marriage was valid.

Counsel for the appellant denies that the plaintiff is a *sartora* son of Desu and apparently does not claim that if he is a *sartora* he has any rights of inheritance. His main contention is that the marriage of a *Rajput* with a *Khatrani* woman, as Haria's mother was, is not invalid. No doubt if such a marriage is invalid by custom or Hindu Law, Haria is illegitimate and comes under the category of a *sartora* son.

On referring to the *Rivaj-i-am* we find that it treats of the rights of a son by a *ghair mankuha* woman, *i. e.*, one not married to the father. The custom stated is that such a son is called *sartora* and can only get maintenance and nothing else. This throws no light on the question before us.

Of the precedents cited by the Divisional Judge, Appeal No. 524 of 1897 (Divisional Register) related to a case of an admitted *sartora* son born of a woman of a different caste, and it was admitted by the appellant that there was no marriage between his mother and his father.

The suit decided by *Lala Dhani Ram Tehsildar, Munsif, Sudama &c.*, versus *Kalma &c.*, was one between the son of a *Bhadiar Rajput* by a *Brahmani* widow and no *Ghingara* (*i. e.*, widow,) marriage was found to be proved. Plaintiffs' mother, in her plaint, did not set up such a marriage. She lost her suit.

In the third case, Civil Appeal No. 384 of 1903 (Divisional Register) the plaintiffs were treated as *sartoras* by the two lower Courts, but they contended that their mother, though a widow, was married to their father, and the Chief Court, after a further inquiry, found the marriage proved and reversed the decree of the lower Courts, disallowing the claim on the ground of illegitimacy, and held them entitled to sue as legitimate sons, and remanded the case for inquiry into other points. This case is therefore wholly inapplicable.

The two other cases before cited are equally inapplicable. In Appeal No. 524 of 1897 (Divisional Court's Register) the son admitted that there had been no marriage between his father and mother, and in the case decided by the *Tehsildar* marriage was not proved. Thus the *Riwaj-i-am* and the precedents relied on by the Divisional Judge appear to us to be valueless as guides for the decision of this case. The plaintiff here contends that he is not *sartora* and insists that his mother was married to Desu. On this latter point there is no finding by the Divisional Judge, nor on the question which was raised in his remand order, *viz*, whether the marriage of a *Rajput* with a *Khatrani* woman is or is not valid by the custom. The whole reasoning on which his judgment proceeds appears to fall to the ground upon a close scrutiny of the record.

On the first point for determination, *viz.*, whether there was a marriage between plaintiff's mother and Desu, though the first Court described the former as Desu's mistress, and the Divisional Judge has given no definite opinion, our view is that it must be decided in plaintiff's favour. The marriage took place in the Peshawar District, more than fifty years ago, and direct evidence is necessarily wanting, but we have the fact that in the suit of 1880 Desu distinctly said that there was a marriage with the proper ceremonies between him and plaintiff's mother, and this is admissible under Section 32 of the Evidence Act and is most valuable evidence. He made a similar admission in the deed of gift of 1878, in which he described plaintiff's mother as his wife and plaintiff as his son. It is also abundantly clear that Desu treated plaintiff as his legitimate son during life and lived with him. There is some vague evidence offered in the present proceedings on plaintiff's side of the same character, and the story of marriage is not rebutted directly or indirectly by the evidence tendered by the respondents. It must be held in these circumstances that there was a marriage, and we find accordingly.

The question remains is the marriage valid? Desu was a *Rajput* and Haria's mother a *Khatrani*. It is commonly believed that *Rajputs* and *Khatris* are sub-divisions of the old *Khatri* or military caste. Both claim to be descended from that caste and to belong to it. According to one opinion (Max Muller cited in Crooks' Tribes and Castes of United Provinces of Agra and Oudh, Volume I, Instance xii) the old *Khatriya* caste is extinct, but this is not generally accepted, *Rajputs* are recog-

nized as belonging to it and the *Khatris* have the same origin. We are therefore justified in treating both as sub-divisions of the old military caste. "Sherrings Hindu Tribes and Castes", Vol. I, pages 271, 278.

They, however, follow different avocations, and this is probably the cause of their being held to be of different castes. They are, strictly speaking, sub-castes of the ancient *Khatriya* castes.

It is not clear on the record whether the parties are governed by custom or Hindu Law in the matter of marriage, legitimacy and bastardy. Custom is the primary rule of decision if it has been ascertained, but the personal law of the parties is Hindu Law, and the party who sets up a custom contrary to his personal law has to prove it in the first instance. It is important therefore to see what effect the marriage would have under Hindu Law.

According to the original *smritis* inter-marriage among the four primary castes was allowable, particularly where a man of a superior married a woman of inferior caste (Manu. IV, 12, 13). But it is unquestionable that at the present day the Hindu Law, as expounded by the commentators, would not sanction it. This is based on certain texts in the *puranas* by which such marriages are said to be abolished in the *Kalijuga*, viz., the present age. But there is the further question whether this abolition extends to inter-marriage among the sub-castes, *i. e.*, sub-divisions of the four primary castes. On this the opinions of the commentators and writers of text-books on Hindu Law are not so clear and decisive. See the discussion on the cognate question of legitimacy in Sir Gurudas Banerjee's "Hindu Law of Marriage and *Stridhan*," 2nd edition, page 158.

The question arose in the Madras Presidency in *Pandya Talavar* versus *Puli Talavar*, 1 *Madras High Court Report* 478, a case relating to sub-castes of *Sudras*. The High Court (Scotland, Chief Judge, and Holloway, Judge) held that the marriage was not prohibited and therefore valid. The latter learned Judge said, "moreover it (*i. e.*, marriage) is "not invalid if it took place because of the difference of class
"Further I am of opinion that the classes spoken of are the four classes "recognized by Manu and not the infinite sub-divisions of these classes "introduced in the progress of time. I think therefore that, being a "*Sudra*, the woman was of the same class in the sense of the authority "quoted." The judgment was upheld by their Lordships of the Privy Council who, though they did not agree with everything that was

stated in the decision of the High Court, came ultimately to the conclusion "that the utmost that has been alleged really is, that the "*Zimindar* was of one part of the *Sudra* caste and the lady to whom he "was married was of another part, or of a sub-caste, their lordships "held the marriage to have been valid ; to hold the contrary would, in "fact be introducing a new rule and a rule which ought not to be "countenanced." They further held that the opinions of the *pandits* consulted, which were adverse to the validity of the marriage, were "mere matter of reasoning, and where they refer to authority it is to "authority which appears to persons of two different but higher castes, "not to the *Sudra* caste at all, and still less to what may be called different classes or divisions of one and the same *Sudra* caste." They also observed that when once you get to this, *viz.*, "that there was a marriage in fact, there would be a presumption in favour of their being a "marriage in law." 13 *M. I. A.*, 141. In *Rama Mani Ammal versus Kulanthai Natcheir*, 14 *M. I. A.*, 346, their lordships affirmed the same principles and upheld the validity of a marriage between a man of the *Malavar* caste with a woman of the *Vellalu* caste, both castes being sub-divisions or sub-castes of the primary *Sudra* caste. These cases in our opinion finally settle the question of validity of marriages between persons of different sub-castes of the *Sudra* caste in the Madras Presidency.

Fakirgauda v. Gangi, 1 *L. R.*, XXII *Bom.*, 277, is the only case from the Bombay Presidency that was cited in the argument having any bearing on the question. It was a case of a marriage between members of two sub-sections of the *Lingayet* caste (*Sudras*) and the marriage was held to be valid under Hindu Law following the Privy Council rulings already cited and a Calcutta case to be presently noticed. *Bai Lakshmi versus Kalian Singh*, 2 *Bom.*, *Rep.* 128 has no bearing, as it relates to an inter-marriage between two primary castes.

In Calcutta the question has arisen several times and the weight of later authority is on the whole in favour of the view that inter-marriage between sub-castes of *Sudras* is valid under Hindu Law. In *Melaram Nudial versus Thanooram Bamun*, 9 *W. R.*, 552, Mr. Justice Dawarka Nath Mitter, ruled that general Hindu Law was against the validity of a marriage between a *Dome Brahmin*, and a *Harie* girl and that local custom alone could give sanction to it. In *Narain Dhara versus Rakhal Gain*, 1 *L. R.*, I *Cal.*, 1, Mr. Justice Romesh Chander Mitter

was of opinion that a marriage between persons of two different castes of *Sudras* or rather sub-castes was bad under Hindu Law, but Mr. Justice Markby doubted the correctness of this *dictum* holding that *Sudras* formed originally but one caste and felt great hesitation in affirming that the restriction against marriages between members of different modern sub-divisions of that caste was sanctioned by law. He agreed, however, with Mr. Justice Mitter in remanding the case for an inquiry into custom and the point therefore was not finally decided. In *Upoma Kuchain versus Bholaram Dhubi*, I. L. R., XV Cal., 708 it was distinctly affirmed that such marriages are not barred by Hindu Law, and the learned Judge adopted the reasoning of their lordships of the Privy Council in the two cases cited, and held that point was settled by them. See also *In re Ram Kumary*, I. L. R., XVIII Cal., 264, which supports the same doctrine. Shama Charun Missar's *Vyavastha Durpana*, page 1038, lays down the contrary principle, but it contains reference to no recognised authority, and is merely the learned author's opinion, which, though entitled to respect, is not conclusive. Moreover, it has not been followed in the latest Bengal cases. In any case its authority cannot extend beyond Bengal proper, where caste restrictions are exceptionally strict, whereas in the Punjab they are much more lax. In the same author's "*Vyavastha Chandirka*," volume II, pages 1054, para 693, there is a similar opinion expressed as regards such inter-marriages between members of different castes and sub-castes in the countries governed by the law of the *Mitacschara*, but this view is open to the strictures passed by their Lordships of the Privy Council in their judgment in the first case cited, and is distinctly opposed to their ruling as respects sub-castes of *Sudras* of the Madras Presidency.

We have come across no case bearing on this point of Hindu Law from the United Provinces. In this province also there is no decision on the legal question that we have been able to find, but there are some bearings on Customary Law which will be noticed further on.

There is a text of Vishnu Chapter 16 V. 15 which is sometimes relied on as showing that inter-marriages between sub castes is forbidden. It runs thus "All (members of mixed castes) should have intercourse (of marriage and the like) with members of equal (or same) castes." (I. C. Ghose's translation) Dr. Jolly's translation (*Max Muller's Sacred Books of the East*) is practically identical. "All

(members of mixed castes should have inter-course of marriage and other community) only between themselves." Though *Vishnu Samhita* is amongst the oldest law treatises on Hindu Law it is well known that the existing book is a modern version. It is abundantly shown in the *smritis* or law treatises as well as the older books of Sanscrit literature that in ancient India inter-marriage between different castes was legal and not uncommon. That rule is prescribed in this treatise also, but the restriction above quoted is a much wider departure from that rule than is to be found in the extant works of any of the law givers. In the *Mitacshara* which is a commentary on the Institutes of Yagnavalkia, composed it is believed in the eleventh century A. D. it is stated that inter-marriages between the different castes were not unknown. "Under the sanction of the law instances do occur" it says. *A fortiori* this prohibition of inter-marriage between sub-castes cannot be an injunction of the original author of the treatise, but a recent interpolation, and has not the authority of the lawgiver. It is not noticed in any of the judgments cited, and it appears to us that it cannot prevail against the *dictum* of the Privy Council.

It must be held in our opinion that Hindu Law as has been interpreted by Privy Council does not forbid inter-marriage between sub-castes of *Sudras* though in practice they are extremely rare and social usages discountenance them. But the rarity of such marriages and the disfavour of society cannot of themselves suffice to render them invalid and the issue of such unions illegitimate. These results can only flow from express texts prohibiting such marriages or unanimity of the commentators in treating them as unlawful according to their interpretation of the law. But we have seen that no such authentic text or unanimity of opinion exists. Well recognized and universally accepted local or tribal custom can also bring about such consequences and this will be discussed hereafter. But among *Jats*, the leading *Sudra* sub-caste in the Punjab, it is well known that the rules are notoriously lax and marriages with other sub-castes, except possibly those whose touch is pollution, such as sweepers and *chamars*, are generally recognized, see No. 73 *P. R.*, 1897; 51 *P. R.*, 1900 so that we should be justified in holding that the declaration of the law as regards *Sudras* in respect of intermarriage between sub-castes by the Privy Council is binding in the Punjab though the cases in which the declaration was made arose in the Madras Presidency.

(1) *a. c. P. L. R.*, 1900 p. 412.

This being the rule for *Sudras*, what should be the Hindu Law regulating inter-marriages between sub-castes of the primary caste of *Khatriyas*? The same analogy must apply with greater force, there being no restriction or prohibition applicable to them. The *Khatris* and *Rajputs* are not mixed castes as we understand them, and the prohibition of Vishnu, which relates to such has no bearing. We think, therefore, that Hindu Law must be held not to invalidate marriages between members of these castes.

It remains to be considered whether such marriages are prohibited and invalidated by the custom of the *Rajputs* of the Kangra District. The *onus* of proof of such a custom must lie on the party who affirms its existence because it is opposed as we have held to his personal law. Another reason why it should so lie and heavily is that it is a well known rule of law that when a marriage is proved in fact, the presumption is always in favour of its being good in law. Their lordships laid this down in *Inderun Valung Pooley Taver versus Ramasawmy Talaver* 13 M. I. A. 141, and the same principle was acted on in *Lachman Kaur versus Mardan Singh*, I. L. R., VIII All., 143. It is in fact too well established to require further discussion.

Beginning with the reported judgments of this Court we find that in No. 29 P. R., 1882 it was held that a marriage between a *Rajput* and *Brahman* woman in the Sialkot District would be invalid. But it was also found that the marriage was not proved. Under Hindu Law such marriages would have been reprobated even in the old times and inter-marriages between the primary castes is not prohibited. This case therefore is of no value. In No. 57 P. R., 1893, a case from the same district the same doctrine was affirmed.

In No. 48 P. R., 1890, a case from the Ambala District, marriage was presumed from long co-habitation between a *Brahman* man and a *Rajput* woman, and it was held to be valid by custom and the issue of such union legitimate. This case is of some importance, as it shows that the prohibition against inter-marriage between the primary caste under modern Hindu Law was relaxed by custom even among the *Brahmans* of Ropar *Tehsil*.

The inquiry into custom in this case is as complete as could be expected. A fair amount of evidence was taken at the first trial and the Divisional Judge remanded the case for investigation into the very

points we are discussing. Again a number of witnesses were examined and some instances were cited and there seems no reasonable prospect of more light being thrown on these points if an inquiry is again ordered. The case has lasted a long time, and apparently all the available evidence has been produced in Court, and we see no object in prolonging this litigation any further. We therefore consider that the case must be decided on the existing record as regards the question of custom.

The evidence appears to be at best inconclusive. It is beyond doubt that inter-marriage between different sub-castes of the primary caste as well as members of the primary caste are very rare and almost unknown, but they do occasionally take place. None of the witnesses speak as to custom applicable to such cases, nor refer to any instance in which such a marriage took place. They speak of *sartora* and *mud-khulas* (kept women) who have no real bearing upon the question before us. No instance is cited in which a marriage with a *Khatrani* or *Arora* woman with a *Rajput* has been held to be invalid on any previous occasion by Courts of Justice, or by the brotherhood of *Rajputs* and the issue disinherited. It seems unquestionable that without such instances the presumption in favour of validity of the marriage cannot be rebutted.

We have, however, certain indications from the evidence that although *Rajput* society looks on such marriages with disfavour, it does not absolutely refuse to recognize them. Now *Haria's* mother clearly lived with *Desu* as his wife and *Haria* has been recognized as *Desu's* son in most respects, if not all, by the brotherhood. He was recorded as *Desu's* son in the Settlement record, which he could not have been had he been universally treated as illegitimate. In the next place he was allowed the place of honour as a bridegroom when his marriage took place, and the brotherhood sat and ate in the same row with him. He is given the *hugqa*, but the bulk of defendants' witnesses and some of his own say he is not allowed to smoke from the same pipe. The case being somewhat novel, the brotherhood do not treat him with absolute equality with the son of a *Rajput* wife, but it is equally clear he is placed above a *sartora* son. This treatment does not show that by custom the marriage is invalid and *Haria* illegitimate, but rather the contrary. Such a custom would require clear evidence or definite and specific instances, which are not forthcoming.

We have said already that in the Punjab caste restrictions are more lax than elsewhere in India, that is to say the old Aryan customs survive here more than in other parts of India. We have already referred to the marriage customs of the *Jats*, the principal *Sudra* caste in the province. It appears also that *Rajputs* as a caste are generally more liberal in that respect than other castes for whereas *Brahmans*, etc., have given up inter-marriage with *Brahmans* of other provinces, *Rajputs* freely inter-marry with *Rajputs* all over India, and in this respect follow the ancient custom that once obtained all over the country. The evidence shows that in the hills *Rajputs* take wives from classes lower in rank than themselves, which is not apparently to the same extent the usage of *Rajputs* of the plains and which militates against the rule of equality of caste upon which the prohibition of inter-marriage between different castes is founded. The *Bhadiar* section of *Rajputs*, to which the parties belong, does not rank high in the social scale among *Rajputs*, and the witnesses are not agreed whether they receive the *Jai Dewa* salutation, which is accorded to true *Rajputs*. Moreover, some witnesses, e.g., Bhawani Singh for defendant, admit that daughters of *Rathis* can be married by the parties' class. Jey Gopal says the same, but is not sure whether the issue will get the *hugqa*. But *Rathis* distinctly are a lower caste than *Khatris* being midway between *Khatris* and *Sudras*, and belonging to neither caste. *Vide* Burney's Settlement Report, para. 272. See also Sir James Lyall's remarks on Caste in the Hills page 74, Gazetteer of Kangra—1883-1884.

The custom of *sarotras* getting maintenance involves some recognition of rights of children by women of other classes, and is itself some departure from rigours of the rules of caste. It seems to indicate a partial survival of the old custom of the men of the royal race associating with women of other classes. According to the judgment of the Divisional Judge in Civil Revision No 384 of 1903 (Divisional Register), it appears that some *sarotras* have been getting shares in their fathers' property, though it seems their right is not universally recognized. Great weight undoubtedly attaches to the finding of the Judge of the first Court, who is himself a *Rajput* of rank, but we are proceeding upon considerations that did not enter into his decision, and on legal principles which are not discussed in it. He has besides referred to no instances or specific evidence in support of his opinion.

Upon a review of the evidence it does not clearly appear that there is any custom established among *Bhadiar Rajputs* under which the marriage of such a *Rajput* with a woman of the *Khatri* caste can be clearly pronounced to be invalid and its issue illegitimate. That being so, the presumption in favour of the validity of the marriage between Desu and Haria's mother is not rebutted and Haria's legitimacy cannot be successfully impugned. It follows that he is entitled to claim rights of reversion to his half brother Lehna's estate in preference to the defendants, who are first cousins. The Divisional Judge has, in our opinion, erroneously held that he is not.

We accept the appeal and decree the plaintiff's claim for the declaration asked for. Parties will bear their own costs throughout.

Appeal allowed.

APPELLATE SIDE.

No. 65.

CIVIL.

Before Mr. Justice Lal Chand.

(HIRAGH DIN,—(PLAINTIFF),—APPELLANT,

versus

NIZAM DIN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 741 of 1906.

Civil Procedure Code (Act XIV of 1882), Section 13—Res-judicata—Parties litigating under same title.

On the death of the sonless proprietor the property in suit was mutated in revenue papers in the name of the defendants. The plaintiff's claim for possession based on the allegation that he, and not the deceased, was the owner of the property was dismissed. He brought a second suit for possession on the ground that he was entitled to it as adopted son and heir of the deceased, and the suit was dismissed as barred by *res judicata* under Section 13 of the Civil Procedure Code.

Held, that the suit was not barred.

Further appeal from the decree of J. G. M. Rennie, Esquire, Additinal Divisional Judge, Amritsar Division, dated 25th May 1904.

Mr. Oertel and Khowaja Zia-ud-Din, Pleader, for Appellant.

Choudhri Nabi Bakhsh, Pleader, for Respondents.

JUDGMENT.

LAL CHAND, J.—(25th June, 1906).—The lower Courts have dismissed this suit as barred by Section 13, Civil Procedure Code, under the following circumstances:—

One Kutba, who was entered in the revenue papers as owner and mortgagee of portions of the land in suit, died childless on 12th February 1903. Mutation of names having been effected in defendants' favour as reversioners of Kutba, the present plaintiff sued the present defendants on 24th July 1903 for a declaration that he was sole proprietor in possession of the land entered in Kutba's name as owner. The suit was based on the foundation of a sale deed, dated 3rd June 1887, on which plaintiff relied to support his title. The defendant pleaded that Kutba was the true owner, and that the sale-deed relied upon by plaintiff to support his title was caused to be executed *benami* in plaintiff's favour by Kutba. The Court held that the sale-deed was *benami* and that Kutba was the true owner, and on these findings dismissed plaintiff's suit on 25th January 1904. On 11th February 1904 the present suit was instituted by plaintiff-appellant for possession of land claimed in the former suit and for additional 7 *kanals* and 17 *marlas* held by Kutba as mortgagee, alleging his title to recover possession as heir and adopted son of Kutba. The lower Courts have dismissed the suit as barred by Section 13, Civil Procedure Code, on the ground that the plaintiff ought to have included his claim as an adopted son in the former suit as an alternative claim. I am unable to agree with the view taken by the lower Courts. It appears to me that the lower Courts have failed to notice that the plaintiff is not now litigating under the same title as in the former suit. His former suit was based on an allegation that he was owner of the land then sued for by reason of his purchase in 1887, and he produced and relied upon the sale deed, dated 3rd June 1887, as the foundation for his title. According to the allegations made in the former suit Kutba never owned or held the land in dispute. On the other hand, in the present suit plaintiff admits Kutba's title and claims as his heir. It is inconceivable how under the circumstances plaintiff could have included such inconsistent claims in one plaint in the former suit without creating confusion. Moreover, the decree passed in the former suit disposed of plaintiff's title as then set up, *viz.*, that he was owner of the land by purchase. This decision by implication decided against plaintiff all grounds whether urged or not by which he might or ought to have supported his claim as owner by purchase. But the decree then passed could by no means be held to have disposed of the ground of title now alleged, *viz.*, that plaintiff was entitled to recover possession not as owner in spite of Kutba but as his

heir and adopted son. Explanation II to Section 13 on which the lower Courts and respondents' pleader have relied is altogether inapplicable to such a case. Explanation II merely explains a matter directly and substantially in issue in a suit, but it does not dispense with the necessity of finding in a particular case the other equally essential requirements of the section such as that the parties were litigating under the same title and that the matter in issue was finally heard and decided. It is true that a matter which was not alleged, but might and ought to have been alleged, would not ordinarily be expressly heard and decided in the former suit, but it might be disposed of by implications, *i.e.*, the gist and nature of the decision might be such as to include by implication a final decision of that matter. Anyhow explanation II is merely an explanation of a part of Section 13, and cannot be treated as over-riding or dispensing with the other equally essential provisions of the section. I therefore hold that Section 13 is not applicable to the present case. The view I take is supported by the following authorities :—

Pala Mal and others v. Maya (146 P. R., 1890), *Ramaswami Ayyar v. Vythinatha Ayyar* (I. L. R., XXVI Mad., 760) *Veerana Pillai v. Muthukumara Asary* (I. L. R., XXVII Mad., 102) *Woomesh Chandra Maitra v. Barada Das Maitra* (I. L. R., XXVIII Cal., 17, and *Kailash Mondul v. Barada Sundari Dasi* (I. L. R., XXI V Cal., 711).

For the respondents reliance was placed on *Kanhya Lal v. Charati Lal* (4 P. R., 1899), *Badar Din v. Bura Mal* (4 P. R., 1903), *Banne Shah v. Karm Chand* (89 P. R., 1881), *Kesar Singh v. Jawand Singh* (142 P. R., 1884), *Kaka v. Bhola* (96 P. R., 1881), *Pala Mal v. Maya* (146 P. R., 1890), *Nek Muhammad v. Sattar Muhammad* (63 P. R., 1896), *Zafaryah Khan v. Fatteh Ram* (100 P. R., 1898), *Imam Khan v. Ayub Khan* (I. L. R., XIX All., 517), *Kameswar Pershad v. Rajkumari Ruttan Koer* (I. L. R., XX Cal., 79), *Dost Muhammad Khan v. Said Begam* (I. L. R., XX All., 81) and *Fulandar Singh v. Jwala Singh* (I. L. R., XX All., 516), but they are inapplicable.

(1) *Kanhya Lal v. Charati Lal* (4 P. R., 1899) distinctly proceeded on the ground that *the claim in each suit being by inheritance*, the plaintiffs in the previous suit might and ought to have asserted their title as collaterals, failing their exclusive title as grandsons.

Badar Din v. Bura Mal (4 P. R., 1903) was a case of a defendant held bound to resist the claim on all grounds available at the time, and his case was held distinguishable from a plaintiff's case who may not be bound to

sue for relief on all the previous causes of action which he may claim to possess.

(3) *Banne Shah v. Karm Chand* (146 P. R., 1881) was a similar case where defendant failed to set up all his pleas in the former suit for possession which was decreed, and defendant was held precluded from suing to recover possession of the same property on a ground which was not pleaded by him in the former suit.

(4) *Kesar Singh v. Jawand Singh* (142 P. R., 1881) proceeded on the same principle as *Badar Din v. Bura Mal* (4 P. R., 1903) already noted.

(5) *Kaka v. Bhola* (96 P. R., 1881) proceeded on the ground that the claim for compensation made in the suit was a condition precedent to ejectment, and therefore ought to have been made a ground of attack in a suit to contest notice of ejectment.

(6) *Pala Mal v. Mayr* (146 P. R., 1890) distinctly laid down the principle that where several independent grounds of action are available a party is not bound to unite them all in one suit though he is bound to bring before the Courts all grounds of attack available to him with reference to the title which is made the ground of action.

(7) *Nek Muhammad v. Sattar Muhammad* (63 P. R., 1896), Section 13, explanation II, was applied on the ground that the matter alleged in the subsequent suit was actually decided in the previous suit against the plaintiff though not raised by him.

(8) *Zafaryah Khan v. Fattah Ram* (100 P. R., 1898 F. B). Full Bench merely laid down that Section 13 would apply if the material issue in both suits be identical although the subject-matter may be different.

This case was quoted with reference to claims for 7 *kanals* 17 *marlas* held by Ku'ba as mortgagee, but is wholly inapplicable as the material issue in the two suits is entirely different and not identical.

(9) *Imam Khan v. Ayub Khan* (1. L. R., XIX All., 517) is more to the point. Plaintiff first sued for possession as owner, which failed, and then sued for possession as mortgagee which was held barred under Section 13, Explanation II. This case, however, was decided with reference to the judgment of their Lordships of the Privy Council in *Kameswar Pershad v. Rajkumari Ruttan Koer* (1. L. R., XX Cal., 79, P. C.) which as pointed out in *Ramaswami Ayyar v. Vythinatha Ayyar* (1. L. R., XXVI Mad., 760) has been misapprehended and misapplied

in certain cases. I am inclined to believe that it was misapplied in the Allahabad case under reference. It was apparently overlooked that in the Privy Council case the title under which the plaintiff sued in the former and the subsequent suit was identical by his title as a mortgagee. He, however, omitted in the former suit to urge defendant's personal liability for the claim on a ground which he urged in the subsequent suit, and under the circumstances it was held that Section 13, Explanation II, applied. It was pointed out : " Where matters are " so dissimilar that their union might lead to confusion, the construction " of the word ' ought,' would become important ; in this case the " matters were the same. It was only an alternative way of seeking to " impose a liability, and therefore ought to have been made a ground of " attack in the former suit ; and therefore that it should be deemed to " have been a matter directly and substantially in issue in the former " suit and is *res judicata*."

It is obvious that this judgment is altogether inapplicable to support respondents' contention in the present case, and it does not seem to me to support the view taken in the Allahabad case under reference, which appears further to be directly opposed to the decision in *Rawaswami's* case.

(11, & 12). Two more cases—*Dost Muhammad Khan v. Said Begam* (I. L. R., XX All., 81) and *Pulandar Singh v. Jwala Singh* (I. L. R., XX All., 516) were relied upon. Both these cases were of omission to plead a certain ground in defence and were analogous to *Badar Din v. Bura Mal* (4 P. R., 1903) already explained.

(12) The second case, however, was expressly overruled by Full Bench judgment of the same High Court in *Ram Chand v. Durga Prasad* (I. L. R., XXVI All., 61) and is moreover opposed to the view taken in *Khairati v. Akko* (108 P. R., 1882) where it was held that the subsequent suit for pre-emption by the same plaintiff who failed to set aside a sale as a reversioner was not barred under Section 13, Explanation II.

It is thus clear that none of the cases quoted for respondents support the view taken by the lower Courts, and the single case, which is somewhat analogous, *vis. Imam Khan v. Ayub Khan* (I. L. R., XIX All., 517) proceeded, I venture to think, on a misapprehension and misapplication of the judgment of their Lordships of the Privy Council in *Kameswar Pershad v. Rajkumari Ruttan Koer* (I. L. R., XX Cal., 79).

I, therefore, hold that the suit is not barred under Section 13, Civil Procedure Code.

The appeal is accepted and case remanded under Section 562, Civil Procedure Code, for decision on the merits. The Court-fee on appeal will be refunded and other costs will be costs in the cause.

Appeal allowed.

APPELLATE SIDE.

No. 66

CIVIL.

Before Mr. Justice Johnstone.

HARI SINGH,—(DEFENDANT)—PETITIONER,

versus

NIKA SINGH, AND OTHERS,—(PLAINTIFFS)—RESPONDENTS.

CASE No. 2057 OF 1905.

Punjab Courts Act (XVIII of 1884), Section 40 (1) (b)—Value of suit—Further appeal—Suit for declaration that plaintiff will not be bound by an alienation after alienor's death.

Held, that the value of a suit for a declaration that a mortgage of land assessed to revenue by a widow will not be binding on the plaintiff, reversioner, after the widow's death is thirty times the revenue and not the amount of the mortgage.—145 P. R., 1892, *followed*.

Petition for revision of the order of Captain B. O. Roe, Additional Divisional Judge, Ferozepore Division, dated 14th February 1905.

Mr. Roshan Lal, Advocate, for Petitioner.

Mr. Duni Chand, Advocate, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(7th January 1907).—The first question in this case is whether an appeal lies or not. The suit is for a declaration that a certain mortgage-deed in which the consideration was stated at Rs. 300 but the land mortgaged by which is worth, according to the 30 times *jama* rule, only Rs. 60-3-6, shall not affect the reversionary rights of the plaintiff. I take this to be in effect a suit for a declaration that plaintiff is reversioner to land worth Rs. 60-3-6 according to the said rule regardless of any encumbrance created by the widow defendant.

The first Court dismissed the claim, but the lower Appellate Court decreed it, and the mortgagee came to this Court with a revision petition. In calling for files my brother Kensington noted that an appeal lay as of right, and this opinion was repeated by my brother Rattigan, when the case came on with files. Now that the case has come on for regular trial the point has been raised by the respondents' counsel, and

I am entitled, and indeed bound, to deal with it. He relies upon *Bakhu v. Jhanda and others* (145 P. R., 1892), while Mr. Roshan Lal for the mortgagee relies on *Ghulam Ghous v. Nabi Bakhsh*, 24 P. R., 1903,⁽¹⁾ F. B.

The former ruling has been referred to in the latter, and has been declared good law in very recent rulings of this Court. The suit there was also for a declaration against an alienation for Rs. 1,300, the value of the land by thirty times *jama* rule being Rs. 770. The critical value in that case was Rs. 1,000. It was held that Rs. 700 was the value. In *Ghulam Ghous v. Nabi Bakhsh* three cases were under consideration. The first two were pre-emption suits, and from them it is not suggested that we can deduce any authority to govern cases like the present. The third was a claim by a mortgagee for possession of land, in which it was found by the Court below that the sum of money, on payment of which the mortgagor might redeem, was over Rs. 1,000, while the value by the 30 times *jama* rule was under Rs. 1,000. Here it was held that the value of the property in suit should be taken as over Rs. 1,000. In the second paragraph of the head note this suit is called a suit for redemption, which is clearly a misdescription.

In my opinion I must follow *Bakhu v. Jhanda and others*. The ruling of *Ghulam Ghous* is not directly in point: there the value of the property was no doubt over Rs. 1,000, inasmuch as no one could take it from the mortgagee plaintiff without paying him more than that [sum. Here plaintiff, according to the decree now attached, will, on the death of the widow, get the land without reference to the mortgage-money or its precise amount. There is no connection between the decree and the amount of the mortgage-money.

I rule, then, that no appeal lies, as the value of the suit and the value of the property involved must be taken as less than Rs. 250.

Petition rejected.

APPELLATE SIDE.

No. 67.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

RAM DITTA, AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

TAKHT MAL, AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE NO. 60 OF 1906.

(1) s. c., 35 P. L. R., 1903, (F. B.)

Custom—Succession—Adopted son's right to succeed collaterally in adoptive father's family—Burden of proof—Chima Jats of Daska Tahsil, Sialkot District.

Held, that the defendants on whom the *onus* lay had failed to prove that among *Chima Jats* of *Daska Tahsil* of *Sialkot District* an adopted son can succeed collaterally in his adoptive father's family. 12 *P. R.*, 1892 (*F. B.*), 61 *P. R.*, 1894, 138 *P. R.*, 1894, 29 *P. R.*, 1895, 18 *P. R.*, 1900, s c., *P. L. R.*, 1900, p. 49, 4 *P. R.*, 1906, s c., 55 *P. L. R.*, 1906, referred to

Further appeal from the order of W. Chevir, Esquire., Divisional Judge, Sialkot Division, dated the 25th October 1905, affirming that of Sardar Balwant Singh, Sub-Judge, 1st Class, Sialkot, dated the 15th February 1905, decreeing plaintiffs' claim.

Mr. Shelverton, Advocate, for Appellants.

Rai Sahib Lala Sukh Dial, Advocate, for Respondents.

JUDGMENT.

CHATTERJI, J.—(12th December 1907).—This case was remanded for further enquiry into custom by an order, dated 29th May 1907. A commission was issued by the District Judge to the *Tahsildar* of *Daska*, whose report is against the appellants. The Divisional Judge, who has gone very fully into the evidence, concurs in that finding. Appellant has filed objections, which besides contesting the correctness of the return, urge that the enquiry was not exhaustive in that commission were not issued for the other *Tahsils* of the *Sialkot District*. After hearing arguments on both sides, we are of opinion that there is no strong case for fresh investigations in other *Tahsils*. It appears from the Gazetteer of the *Sialkot District* that the *Chima* are numerous only in the *Daska Tahsil* where there are about 80 villages held by them, according to the Gazetteer, 1883-1884. The Gazetteer of 1894-95 says they are rarely found out of the *Daska Tahsil*. They are inconsiderable in numbers in other *Tahsils*. Our last order left it discretionary with the District Judge to issue commissions for other *Tahsils*, and we do not think any good is likely to result from another remand. Precedents from outside the *Daska Tahsil* have been filed already, and there was nothing to prevent appellant from producing more if he wished to do so. Even before us he has not referred to any new instance. He wants a sort of fishing inquiry on the chance of some more instances being found in his favour. The case has already lasted long and repeated opportunities have been given to the parties to pro-

duce instances, and we see no advantage in granting another remand for appellant's sake. This prayer is accordingly refused.

The question remains—whether on the record it can be held that among *Chima Jats* an adopted son can succeed collaterally in his adoptive father's family. The *onus* of proof of such a custom lies on the appellants according to the principle laid down in the Full Bench ruling No. 12 *P. R.*, 1892, and other authorities *e. g.*, Nos. 61 and 138 *P. R.*, 1894, 29 *P. R.*, 1895 and 18 *P. R.*, 1900.⁽¹⁾ The further inquiry has not thrown much additional light on the point, but its result is on the whole adverse to appellants.

There were altogether ten precedents cited by the defendants. Of these No. 1 *vide* judgment of the Divisional Judge, referred to a *lambardari* case in which the parties were apparently not shown to be *Chimas*. This was from the Sialkote District and apparently has no bearing on the question before us. In No. 2, which was a mutation case in which the adopted son was a nephew and after succeeding to his adoptive father's estate got portion of the lands of other brothers by arrangement with his natural father, who was the other heir. This case also is valueless as a precedent, as there was no collateral to contest the claim, and full shares were also not obtained as adopted son. No. 3 is a *Bajwa* mutation case of *Pasrur Tahsil*, and No. 4 of *Nangar Jats* of *Daska Tahsil*, No. 7 is also a *Bajwa* mutation case, and the facts are not clearly elucidated, but apparently the adopted son got an equal share of the land of a brother of his adoptive father in competition with other nephews of the deceased. In No. 8, no enquiry was made, but a decision was passed in the adopted son's favour on the authority of No. 4 *P. R.*, 1906,⁽²⁾ and the *Riwaj-i am*. The case has yet to stand the test of an appeal, and it is one decided after the date of our order of remand. The same remarks apply to No. 12 of the Divisional Judge, which was moreover a case among Muhammadans, decided on the 9th May 1907, and to No. 9, a case relating to *Kung Jats*. The facts of No. 11 are disputed, the adopted son, Kirtar Singh, asserts that he has succeeded to the estate of Hakim Singh, brother of his adoptive father, while the *Lambardar* of the village states that he has not. This case, which is otherwise in point, will have to be left out of consideration, as it is not yet finally settled and possibly may go to Court. On the plaintiffs' side, *Buta versus Prema*, decided by the Additional District Judge of Sialkote on

(1). s. c., *P. L. R.*, 1900 p. 49.

(2). s. c., 55 *P. L. R.*, 1906.

20th February 1906, is exactly in point, and so would case No. 266 of 1906 of the Chief Court be, but that the parties were *Ghumman Jats*, not *Chimas*.

The result of the enquiry in the present case is that there are three mutation cases, Nos. 2, 3 and 4 of the Divisional Judge, but the facts of the first are very special, and in it the adopted son got something, not his full share in collateral succession, because the only other heir was his natural father. The case is quite inconclusive. The other cases related to other tribes, and mutation was made according to agreement between the contending parties. Of the three judicial precedents filed, two were subsequent to our order of remand in this, and one dealt with another section of *Jats*, and they all followed No. 4 *P. R.*, 1906⁽¹⁾ without any special enquiry into custom. It cannot be said that these cases throw any light on the question of custom under enquiry. Our object in ordering a remand was to find out whether No. 4 *P. R.*, 1906⁽¹⁾ could be shown to be really in accordance with custom by further inquiry, and this object would be defeated if we attach any value to decisions subsequent in point of date to our order which simply follow that ruling. The mutation cases are inconclusive and are not numerous enough to be accepted as evidence of custom with confidence. On the other hand, there are judicial cases which are in point, which show that custom does not permit the collateral succession of an adopted son in the family of the adoptive father. We have already discussed the reasoning in No. 4 *P. R.*, 1906⁽¹⁾ in our former judgment, and it appears to us that the weight of judicial decision in that case too was against the adopted son, though there were some instances of mutation in his favour. We have been unable to examine these cases for ourselves as the record is not here. It does not seem to be of much use to prolong this case for the sake of such examination. It is obvious that there are a few instances in which such succession has been permitted, but they and the entry in the *Riwaj-i-am* do not appear to be sufficient to out-weigh the cases to the contrary and the judicial decisions against the adopted son. The onus on the appellants to prove his allegation ought to be discharged by evidence of a cogent character, which is not forthcoming, and our finding therefore ought to be against the appellants. The oral evidence of respectable men of the tribe taken in this case is against his contention.

We accordingly uphold the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(1). S. C., 55 *P. L. R.*, 1906.

APPELLATE SIDE.

No. 68.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Chitty.

MAHTAB SINGH,—(DEFENDANT),—APPELLANT,

versus

NIAZ ALI,—(PLAINTIFF),—RESPONDENT.

CASE No. 1396 OF 1905.

Custom—Pre-emption—Houses—Vicinage—House situated on the opposite side—Katra Kanhayan of Amritsar City.

Held, that where a pre-emptor's house is separated from the house sold by a road or lane, there even if the custom of pre-emption prevails in the *mohalla* or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove, by instances in the usual way, that he has such a right.

Held, also, that the plaintiff had failed to prove such a right in respect of a sale of a house in *Katra Kanhayan* of *Amritsar City*, where a custom of pre-emption on the ground of vicinage was found to prevail.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 13th October 1904.

Bhagat Ishwar Das, Pleader for Appellant.

Khawaja Kamal-ud-din, Pleader for Respondent.

JUDGMENT.

CHITTY, J.—(3rd November 1906).—The plaintiff sues for possession by pre-emption of a house situate in *Katra Kanhayan* in *Amritsar* city. The plaintiff's house, by virtue of which he claimed the right, is situate opposite to the house in suit, on the other side of a narrow gully. The plaintiff succeeded in proving that the custom of pre-emption prevails generally in *Katra Kanhayan* but he did not prove that it would apply in the case of houses not adjoining or contiguous but opposite to one another. The only point for our determination is whether the plaintiff has carried his case far enough. The Courts below relying on the ruling in *Ali Muhammad v. Radir Bakhsh* (107 P.R., 1900), that "it is not necessary to prove contiguity of houses and that ordinarily vicinage is sufficient" decided in the plaintiff's favour. It is to be regretted that they did not also refer to the case of *Mela Ram v. Prema* (109 P.R., 1900), which is to be found two pages below in the same volume, for there a very different view of the law is given. The question however has been recently discussed by a Division Bench of this Court (of which I was a member); see *Ilahi Bakhsh v. Miran Bakhsh*

(68 P.R., 1906⁽¹⁾). In that case the *dictum* in the case relied upon by the Courts below (*Ali Muhammad v. Kadir Bakhsh*) was expressly dissented from. The Division Bench case appears to me to be not distinguishable in principle from the case now before us and I need only say that I adhere to the conclusions at which we then arrived after a full consideration of the various authorities. The learned pleader for the respondent has cited another recent ruling of this Court *Jai Devi v. Naubat Rai* (71 P.R., 1905⁽²⁾). That was a case of rival claimants and preference was given to one who owned nearly half the house along with the vendor in preference to the vendee who owned a house across a lane. That case, in my opinion, has no bearing on the present. It does not help the respondent in any way. Adhering to the ruling in *Ilahi Bakhsh's* case I would hold that it was incumbent on the plaintiff to prove, not only the general custom, but such special incidents as would make it applicable to his case, namely, that of a house opposite to and not adjoining the house in dispute. The plaintiff having failed in that respect, his suit should be dismissed.

I would allow this appeal and dismiss plaintiff's suit with costs throughout.

JOHNSTONE, J.—(3rd November 1906).—I agree with my learned colleague that *Ilahi Bakhsh's* case must be followed here.

After considering the contention set up by Mr. Kamal-ud-din against the soundness of that judgment—a contention by no means devoid of force—I hold that we should dissent from that judgment. I would like, however, to state this part of Mr. Kamal-ud-din's argument so as to show exactly what it is that we overrule in it.

He argues that, leaving out *Ilahi Bakhsh's* case the series of rulings on the subject of pre-emption in towns when analysed yield three categories of cases, namely:—

- (1) Contest between neighbour and stranger.
- (2) Contest between neighbour and neighbours.
- (3) Contest between neighbour and co-sharer.

Under (1) come *Balia Ram v. Kallan Khan* (108 P.R., 1886), *Muhammad Salamatulla v. Jabal-ud-din* (24 P.R., 1887), *Ali Muhammad v. Kadir Bakhsh* (107 P.R., 1900) and *Jai Devi v. Naubat Rai* (71 P.R., 1905⁽²⁾). In all these cases, he asserts, no stringent proof of custom

(1) S.C., 138 P.L.R., 1906.

(2) S.C., 129 P.L.R., 1905.

was required, it being held sufficient that the custom of pre-emption did prevail in the part of the town concerned.

Under (2) came *Mehtab Roy v. Amir Chand* (189 P. R., 1882) *Chaudhri Khem Singh v. Mussammatt Taj Bibi* (83 P. R., 1883); *Nawab Muhammad Mumtaz Ali Khan v. Khan Ali Khan* (36 P. R., 1897) and *Mela Ram v. Prema* (109 P. R., 1900). In all these cases he asserts, stringency of proof was demanded, because both claimants—pre-emptor and vendee—were neighbours and the plaintiff should show that his special kind of vicinage was superior.

Category (3) I need not comment upon.

There is a certain plausibility about this suggestion that a neighbour of any kind—neighbour by contiguity or neighbour by mere proximity—should in a tract where pre-emption prevails, merely because of being a neighbour, be preferred to a complete stranger. But I think it is safer not to allow the suggestion to be applied to cases of proximity across a road as here. I would hold that, where the plaintiff's house is separated from the house in suit by a road or lane, there even if the custom of pre-emption prevails in the *mohalla* or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove by instances in the usual way that he has such a right. I am not called upon to lay down any rule to govern cases in which plaintiff's house is not across a road from but (say) back to back with that in dispute. I am not sure that in such a case Mr. Kamal-ud-din's suggestion would not be fully applicable. I confine my decision to the precise case now before us. The result is that the appeal is accepted and the suit dismissed with costs throughout.

Appeal accepted.

APPELLATE SIDE.

NO. 69.

CIVIL.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

THAN SINGH,—(PLAINTIFF),—APPELLANT,

versus

TARA SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 592 OF 1903.

Custom—Pre-emption—Houses—Mohalla Parachian otherwise called Mohalla Matta or Waris Khan of Rawalpindi city—Evidence—Right admitted in suits,

Held, that the custom of pre-emption in respect of sales of houses was proved to exist in *Mohalla Parachian* otherwise called *Mohalla Matta* or *Waris Khan* of Rawalpindi city.

Judgments in suits for pre-emption passed on the admissions of vendees are relevant when custom of pre-emption is in question.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Rawalpindi Division, dated 14th March 1908.

Me srs. Beechey and Nanak Chand, Advocates for Appellant.

Mr. Muhammad Shafi, Advocate for Respondents.

JUDGMENT.

CHATTERJI, J.—(17th November 1906).—This is a suit for the pre-emption of a house in the city of Rawalpindi in which the Courts below have differed in opinion as to the existence of the custom.

The Divisional Judge holds that the sub-division of the city in which the house is situate is *Mohalla Parachian* otherwise called *Mohalla Matta* or *Waris Khan*, and that it extends from Sir Iqbal Singh's house on the west to the Murree road on the east.

On this point the parties are agreed in this Court and respondents' counsel has raised no objection to the finding of the Divisional Judge.

The only question then for determination is whether by the custom of the locality the right of pre-emption is proved to exist. Seven cases were relied on by the plaintiff which are noticed and discussed in the judgment of the Divisional Judge, pages 10 and 11 of the printed paper book. Of these No. 6 is clearly irrelevant and was not referred to in the argument.

In the first Court the plaintiff mentioned another instance which appears to have been cited by the defendant as well in which the claim was dismissed.

It is No. 1, for the defendant mentioned in page 11 of the printed judgment of Divisional Judge. Of these the Divisional Judge held that Nos. 1, 3, 4 and 7 were cases in the *Mohalla* and so also No. 1 cited for the defendant. He holds that No. 2 which corresponds to No. 5 of the first Court did not belong to the *Mohalla* and excluded it from consideration. The Subordinate Judge of Rawalpindi in whose Court the case was first tried does not refer to it as one of the cases the locality of which was shown to him when he inspected the spot, and it is not marked in his sketch map. We therefore exclude it from consideration without going

into the disputed point whether Jhangiwala *Mohalla* and *Mohalla* Parachian are identical. No. 5 which is No. 2 of the first Court is also excluded by the Divisional Judge as it is in *Mohalla* Saidpuri, but it is shown in the first Court's map and some of the defendants' witnesses admitted it to be in *Mohalla* Parachian. In the map *Mohalla* Saidpuri commences to the north of this house. We hold therefore that this is an instance in the sub-division in which the disputed house is situate. Case No. II cited for the defendants was also a case from this *Mohalla* according to the finding of the Divisional Judge, but the Courts which decided it held the house then in suit to be situate in *Mohalla* Waris Khan which they found was distinct from *Mohalla* Parachian and not to be governed by instances in the latter *Mohalla* and dismissed the claim on that ground. The Chief Court was unable to interfere with the finding on the revision side and refused to allow the point to be raised before it that the two *Mohallas* were identical. This case should be excluded from consideration both because it proceeded upon an erroneous conception relating to *Mohalla* Waris Khan and because if we take the judgments as they stand upon the finding arrived at in that case, *Mohalla* Waris Khan was distinct from *Mohalla* Parachian.

There are thus five cases in this sub-division which appear to be in point, viz., Nos. 1, 3, 4, 5 and 7 of the Divisional Judge cited for the plaintiff and No. 1 cited by the defendant. Nos. 4 and 5 were decided on compromises and in Nos. 3 and 4 relationship was put forward as the ground of claim. Chronologically the cases may be arranged thus: No. 3 in 1872, No. 7 in 1881, No. 4 in 1882, No. 5 in 1889, No. 1 in 1893 and No. 1 for defendant in 1897. In Nos. 1 and 7 for plaintiff the custom of pre-emption was decided but was found to exist after inquiry.

In case No. 7 reference is made to four precedents in Courts in two of which the custom was found to exist and in two there were confessions of judgment and in all four decrees were given to the plaintiff. The Divisional Judge says that from the evidence given before the Court (Mr. Johnston, Assistant Commissioner) one case was from the *Telis' Mohalla*. This is not very material as it was a fifth case, and excluding it there still remain the four cases mentioned by Mr. Johnston in which decrees were given, though in two on confessions of judgment. Thus there are at least eight cases in this *Mohalla* between 1878 to 1897.

As regards confessions of judgment and admissions they are of course of much less value than contested cases properly decided where custom has been found to exist after due inquiry, but as observed in several judgments of this Court such admissions are not irrelevant and by no means valueless as they may proceed from the consciousness of the existence of the right and the hopelessness of contesting it, *see Ramjas v. Bura Mal* (42 P. R., 1905[1]), *Tagga v. Allah Bakhsh* (69 P. R., 1901), and *Muhammad Nawas Khan v. Mussammat Bobo Sahib* (44 P. R., 1903[2]) and other cases dealing with the weight to be attached to admissions. Each case must be decided on its own facts. Here it does not appear that there were any special reasons for the admissions made or to detract from their value. We think therefore that these cases should be taken into consideration in disposing of the question of the existence of the custom which we are considering.

The net result is that in this *Mohalla* there have been within twenty five years after 1872 nine cases in which the right has been affirmed directly or indirectly. In four, *viz.*, No. 1 and 7 of the Divisional Judge and in two mentioned in the latter case decrees were passed affirming the right after inquiry and in three, *viz.*, No. 5 of the Divisional Judge and two cases mentioned in No. 7 decrees were passed on confessions of judgment. In one, *viz.*, No. 4 of the Divisional Judge, plaintiff gave up his claim on receiving consideration and in No. 3 a decree was passed, but it was a sale by a widow though only pre-emption was claimed. These two cases at least indirectly affirm the right. In regard to the last case it should not be forgotten, that the approved view of pre-emption is that it is the last means by which the heirs can retain the property alienated and though this applies mostly to agricultural land yet pre-emption based on relationship in cities, though rare, is not unknown and was commonly claimed in the early days of British rule. However this may be, we think there can be no rational doubt that these cases show that there is a preponderance of opinion among the residents of *Mohalla Parachiana* or *Matta* and those acquainted with its customs that the custom of pre-emption based on vicinage does exist in the *mohalla* and that the general trend of judicial opinion has been in the same direction. Moreover where the right of pre-emption is shown to exist there is *ex-necessitate rei* a presumption in favour of vicinage (*Choudhri Khem Singh v. Mussammat Lai Bibi* 83 P. R., 1888,

[1] s.c., 58 P. L. R., 1905.

[2] s.c., 75 P. L. R., 1903.

at page 219.) The *mohalla* is an old one and not a new extension of the city of Rawalpindi, and the city itself is largely Muhammadan and therefore presumably saturated with Muhammadan ideas. Cases from other *Mohallas* of the city have not been produced but there is no necessity to go into them as at least they would be merely relevant and not be direct proof of the existence of the custom in this *Mohalla*. The cases cited for the defendant are not in point and the Divisional Judge shows that case No. II was decided on a misconception as to the locality of the disputed house.

We are of opinion on the whole therefore that the existence of the custom of pre-emption in this *Mohalla* Parachian, Matta or Waris Khan is sufficiently proved and that the Divisional Judge has erred in holding otherwise.

We accept the appeal and restore the decree of the first Court with costs in all the Courts. The plaintiff will deposit the purchase money in Court within sixty days from this date failing which his suit shall stand dismissed with costs.

appeal allowed.

APPELLATE SIDE.

NO. 70.

CIVIL.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

ISHWAR DAS,—(PLAINTIFF),—APPELLANT,

versus

DUNI CHAND, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1308 OF 1906.

Punjab Laws Act (I V of 1872), Section 11—Custom—Pre-emption—Towns—Agricultural land—Pre-emption on the ground of vicinage—Amritsar city.

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that the custom of pre-emption on the ground of vicinage existed in respect of sales of agricultural land situate in the Civil Station of Amritsar city.

Further appeal from the decree of J. G. M. Rennie, Esquire, Additional Divisional Judge, Amritsar Division, dated 9th June 1904.

Sardar Gurcharn Singh, Advocate for Appellant.

Mr. Lakhshmi Narain, Advocate & Rai Bahadur Bakhshi Sohan Lal, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J.—(5th December 1906).—The material facts of this case are given in the lower Court's judgments. The land in suit is situate in the Civil Station of Amritsar and in *Tukra* No. 6 in the Revenue Records. Both plaintiff pre-emptor and the defendant purchaser own lands in the same *Tukra*. But plaintiff's land is adjacent to the land sold, and it is further stated that while this is agricultural land that belonging to the vendee is building land.

There is no evidence whatever regarding any custom bearing on the right of pre-emption and it is admitted that the land is within the limits of a Municipality. The adjacency of the plaintiff's land goes for nothing and if the land in suit is held to be within the limits of a town as the lower Courts held the plaintiff's claim fails and has been rightly dismissed by them.

The only case in which plaintiff can succeed is if the land is decided to be situate in a village and defendant held not to be a land owner because his land is building land while the disputed land and plaintiff's other lands are agricultural land. The evidence absolutely fails to show that the land in *Tukra* No. 6 are situate in a village or belong to a village community. All we know is that Amritsar is described as a *Mauza* and the lands are entered in the Revenue Records in *Tukras* of which *Tukra* No. 6 is the one which contains the disputed land with lands of the parties. We cannot on this meagre information hold that *Tukra* No. 6 is situate in a village and that the owners are members of, or belong to a village community. The indications are quite the contrary and *Tukra* is entered in the column of "*Patti*" and the revenue of each is separate. We accept the reasoning used in *Ram Narain Singh v. Sewak Ram*, 21 P. R., 1906⁽¹⁾ to indicate what is a village or a village community. On the evidence adduced it is impossible to come to a finding in plaintiff's favour on this point, and there is no ground for ordering a further inquiry.

As far as one can gather from the undisputed facts (1) that Amritsar is a large town and (2) that land in suit is situate within the limits of the Municipality of that town the case would appear to be governed by Section 11 of the Punjab Laws Act under which plaintiff has no claim.

On the other point, whether defendant's land being building land he should be held not to be a landowner within the meaning of clause

[1] s.c., 110 P.L.R., 1906.

(d) of section 12. The view taken of the meaning of land in this Section in *Haidar v. Ishwar Dass*, 22 P. R., 1906(1) commends itself entirely to our judgment. Nor is it clear that defendant's land can be absolutely excluded from the category of agricultural land in the ordinary sense of the term. If therefore Amritsar is a village and *tukra* corresponds to Patti or Sub-Division of a village we think both parties are equally landowners in the Patti and their rights equal, so that plaintiff has no priority of claim. It is not shown that defendant vendee's land is not assessed to revenue and even if it is not so assessed he would still be a landowner in the (so-called) village, *Jasmir Singh v. Rahmatulla*, 7 P. R., 1896. It would thus seem clear that, even on the assumption that Amritsar is a village within the meaning of sections 10 and 12 of the Punjab Laws Act, plaintiff's claim cannot succeed. We have said already that there is every indication that Amritsar is a town and the locality of the land is situate within the limits of a town, and that as there is no proof of custom in plaintiff's favour the claim is not tenable under section 11 of the Act.

Phallu v. Mukarrab, 153 P. R., 1888 and *Jasmir Singh v. Rahmatulla*, 7 P. R., 1896, has no bearing on this case with reference to its facts.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

REVISION SIDE.

NO. 71.

CRIMINAL.

Before Mr. Justice Rattigan.

ABDULLA KHAN AND OTHERS,—PETITIONERS,

versus

GUNDA AND OTHERS,—RESPONDENTS.

CASE NO. 495 OF 1906.

Criminal Procedure Code (Act V of 1898), Sections 145 and 430—Revision—Criminal Cases—Dispute relating to immoveable property.

Held, that the Chief Court is competent to revise orders passed in proceedings held under section 145 of the Criminal Procedure Code, when the procedure prescribed therefor is not strictly followed.

The Chief Court set aside the proceedings in the present case, when it appeared that a copy of the initiatory order was neither served on the parties

(1) S.C., 115 P.L.R., 1906.

nor affixed at or near the subject of dispute, and all the parties interested in the dispute were not heard.

Petition for revision of the order of R. Sykes, Esquire, District Magistrate, Sialkote, dated 18th March, 1906.

Chaudhri Nabi Bakhsh, Pleader for Petitioners.

JUDGMENT.

RATTIGAN, J.—(5th January 1907.)—Complainants preferred a complaint against three persons, Abdulla Khan, Zaildar, Hassan and Dula, charging the latter with offences under Sections 352 and 504, Indian Penal Code. The Magistrate, 3rd class, acquitted the accused persons of the alleged offence under Section 352 and discharged them as regards the alleged offence under Section 504. The complainants thereupon applied to the District Magistrate for revision of this order. The District Magistrate recorded the following order on this application:—
 "The land is said by appellants to have been ploughed up by the *zaildar* last *musaj*, to have been unoccupied before that; it is said to be the place just in front of their house which is used for their place of meeting and religious services. This is borne out by Mr. Anderson, the Missionary. It appears that the land has been in the occupation of the low-caste Christians for the purpose above mentioned, and that the *zaildar* for the purpose of annoying them has now unnecessarily ploughed up the land. This land is recorded as *abad-i-deh* and should not have been encroached upon. The *zaildar* will be summoned." This order is dated the 26th February, 1906. The *zaildar* was accordingly summoned and both he and Mr. Anderson were examined on the 8th March 1906. As a result of this examination the District Magistrate on the same date recorded the following order:—"I find that there is a dispute about the land likely to lead to a breach of the peace and that the land is in possession, for the purposes of assembly and storage of manure, of the Native Christians of the village; that this possession was wrongfully disturbed by Abdulla, the *sarbara* of the *zaildar*. I now order under Section 145, Original Procedure Code, that this land, which is recorded as *abad-i-deh* and which is shown in the plan attached to the proceedings of the *Nab Tahsildar* as Min. 1616, be replaced in the possession of the Native Christians." Abdulla (who has died meantime), Hassan and Dula applied to this Court for revision of this order as made without jurisdiction, and the grounds urged in support of this application are (1) that there was no preliminary

order of the kind specified in Section 145 (1) of the Code; (2) that the copy of the said order was not served upon any one or affixed to some conspicuous place at or near the subject of dispute, as prescribed by clause (3) of the said Section; and (3) that with the exception of Abdulla none of the parties interested in the land was heard, or evidence taken in accordance with the provisions of clause (4) of the section.

I do not consider the first objection to be well-founded. The District Magistrate distinctly finds on grounds stated by him in his first order that the *zaildar* was ploughing up the land for the purpose of annoying the complainants and that the said land was used by them for their religious "services." Obviously the meaning of the District Magistrate was that under these circumstances a dispute existed likely to cause a breach of the peace. The other objections, however, seem to me to be fatal to the validity of the proceedings and to go to the very root of the matter. The land in dispute is the *abadi-dah* and Abdulla was certainly not only the person interested in the dispute. The copy of the order of the 26th February 1903 was not served even upon Abdulla, nor was any copy of it affixed to any part of the subject of the dispute. Nor again, was any person, save Abdulla, given an opportunity to be heard regarding the subject of the dispute, though numerous persons, including the two petitioners, Huseu and Dula, were interested in the land in question. Under these circumstances the decisions of the Calcutta High Court in *Queen-Empress v. Giobind Chandra Das*, I.L.R., XX Cal. 520, *Laldhari Singh v. Sukhdeo Narain Singh*, I. L. R., XXVII Cal. 892, *Mohesh Sowar v. Narain Beg*, I. L. R., XXVII Cal. 981, *Jagomohan Pal v. Ram Kumar Gope*, I. L. R., XXVIII Cal. 416, *Mangal Hallar v. Naimuddi Fakir*, VI Cal. W. N. 101, are sufficient authority for holding that the proceedings of the District Magistrate were without jurisdiction and must be set aside—See *Dewan Chand v. Queen Empress*, P. R., 2 of 1899, Cr. (F.B.)

I must accordingly set aside the District Magistrate's order of the 8th March 1906.

Application allowed.

APPELLATE SIDE.

No. 72.

CIVIL.

Before Mr. Justice Robertson.

MUNSHI,—(ACCUSED),—PETITIONER,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

Case No. 610 of 1906.

Revision—Criminal cases—Acquittal.

It is very rarely correct to interfere in revision with an acquittal. The P.R. 13 of 1905 (Cr.); s.c., 81 P.L.R. 1905 has been overruled.

Case reported by Major P. S. M. Burlton, District Magistrate, Jullundur, with his No. 699 of 19th April 1906 under Section 438 of the Criminal Procedure Code.

Mr. Roshan Lal, Advocate for Accused.

REPORT.

The facts of the case are as follows:—

"The accused was held to have forcibly entered upon and cultivated land which had come into the possession of the complainant by order of the Chief Court.

The accused was acquitted by Bawa Danlat Ram, Naib-Tahsildar, exercising the powers of a Magistrate of the 3rd class in the Jullundur District, by order dated 13th August 1905, as it was held that the Criminal trespass, not having been accompanied by any intention to intimidate, insult or annoy the party in possession, Section 447, Indian Penal Code was not applicable to the case in accordance with the judgment of the Chief Court in P.R., No. 13 of 1905 (Criminal)(1)."

The proceedings were forwarded for revision on the following grounds:—

"The proceedings were on all-fours with Punjab Record No. 13 of 1905(1), (Criminal) and in accordance with Sessions Judge's No. 812, dated 10th June 1905, forwarding copy of letter No. 2253G., from Registrar, Chief Court, the case is forwarded to the Chief Court on the revision side for reconsideration by a Full Bench of Criminal No. 13 of 1905(1)."

I would ask considering the importance of the point at issue that the Government Advocate be instructed to appear and his attention

(1) s.c., 81 P.L.R., 1905.

specially invited to the remarks of District Magistrate of Jullundur District under printed head No. 15 of the Jullundur District Criminal Report for the year 1904.

JUDGMENT.

ROBERTSON, J.—(1st August 1906).—No appeal has been preferred by Government in this case. I think it is very rarely correct to interfere on revision with an acquittal, and as the desired object has already been allowed and *P. R.*, 13 of 1905, (*Cr.*) overruled by a Full Bench, I think it could not be right or in accordance with the practice of the Court to take any action on revision in this particular case as the correct principle has now been established.

Petition rejected.

APPELLATE SIDE.

No 73.

CIVIL.

Before Mr. Justice Chatterji, C.I.E.,

MEHAR CHAND,—(DEFENDANT),—APPELLANT,

vs.

Mussanmat LACHHMI,—(PETITIONER),—RESPONDENT.

CASE No. 130 OF 1906.

Probate—Bequest of life-interest—Legatee not entitled to probate—Amendment of application for probate to include prayer for letters of administration not allowed.

Where a Hindu testator bequeathed life-interests in the income of certain specified properties in favour of his widows, and the remaining property in favour of his son and one of the widows obtained a probate in respect of the property whose income was bequeathed to her—

Held, that the widow not being mentioned in the Will, as executrix, either expressly or impliedly, was not entitled to the probate.

Held, also, that as the son had a preferable right to be appointed administrator of the estate, amendment of the application for probate could not be allowed to include a prayer for grant of letters of administration with a copy of the Will.

Miscellaneous first appeal from the order of Khan Bahadur Sheikh Khula Bak'ish, District Judge, Gurdaspur, dated the 21st December, 1905, granting probate.

Pandit Rup Lal, Pleader for Appellant.

Rai Sahib Lala Sukh Dial, Pleader for Respondent.

JUDGMENT.

CHATTERJI, J.—(14th July 1906).—In this case the testator left by Will the income of portions of his immovable property for life to his two widows. Their interests as well as the properties of which the incomes are assigned to them are distinct. He left much other property, movable and immovable, in respect of which he made no disposition, and which naturally descended, after his death, to his sons by one of the widows. The widow *Musammam Lachhmi*, applied for probate of the Will, and the District Judge has granted it in spite of the objections of the son.

There is no question about the execution of the Will by the testator. It is urged in appeal that revocation of the Will was pleaded by the objector, but the lower Court did not grant him sufficient time to produce his evidence. After going through the record I am of opinion that this objection is not made out. It appears that a date, 2nd November 1905, was fixed for production of evidence and on that date two of objector's witnesses were examined. The Court then adjourned the hearing to the 20th for consideration of legal contentions of the objector's pleader on which he placed much reliance, and also, for hearing of the rest of the evidence. On 20th November the case appears to have been argued and judgment reserved. No witnesses were summoned for the objector for the 20th, nor were any tendered for examination. Nor was any statement recorded or filed that the Court was refusing to hear evidence. From the record, therefore, it is clear that no evidence was ready on the 20th. Nor apparently was intended to be produced and that the objector preferred to rest his case on the evidence already given and the law points raised. This objection is, therefore, overruled.

The appeal must be decided on the existing record.

There is no contention before me that revocation of the Will is proved by the evidence produced.

The application by the respondent was for Probate of the Will in respect only of the property left her by the Will, viz., a *serai*, rented for 12 years at Rs. 300 *per annum*. She made no claim regarding the property left to the co-widow, nor for administration of the property as to which her husband died intestate. The words of the Will relevant to the matter before me are, "*Karaya sirif serai mulaik Mission*

"School ke (ba istisanai dukanat paiwaste ke) Mussammat Lachhmi ta
 "hayat khud apne saraf me lavegi-ikhtiar intikal ka unko hasil nahin
 "hogi, bad wafat unke misl digar jaidad ke aulad mere mulik unki hogi,
 "mere aulad unke hayat tak unko kiraya khane se rok nahin sakegi."

The petitioner was not named as executrix in the Will and the first question is whether she was so by necessary implication. After taking time to consider my judgment I am of opinion that she is not. There are no words in the Will that clearly bear that construction. If the petitioner was meant to be named as executrix, the other wife, *Mussammat Jiwan*, must have been intended to be an executrix as well in respect of the property given to her for life. The words used merely mean that each of the legatees is to take for life the income of the properties set apart for her and that the other heirs would not be able to prevent them from doing so. This to my mind creates merely a right in the legatees to take the income of the specified properties for their lives and the obligation on the part of the heirs to let them enjoy the same. It does not necessarily make them executors of the Will. *In the goods of Glasson*, 22 W. R. (Eng.) 874 is not in point as there the whole property was left to the legatees and it was provided by the Will that they were "in no way to be interfered with." *In the goods of Radhika Mihan Sett* 7 B. L. R. 563, was also a case of a bequest of the whole, and though the construction put by the learned Judge is that conceded for by respondent's counsel the distinction in the case is that there also the whole property was left to the claimant, there was a direction that the person named should administer the estate.

It was, however, distinguished in *ex-parte Vittal Das*, I. L. R., XV Mad., 360 and differed from *in the goods of Soshi Bhushan Bannerjee*, I. L. R., XIX Cal., 532. Both the latter cases were cases of universal bequests and yet the legatees were held not entitled to probate. The first case is different from the present one and may further be treated as overruled. The Calcutta Court has always refused to follow it. Universal legatees are both under Indian law and English practice treated as entitled to Letters of Administration with the Will, annexed and not Probate. See the authorities cited in the Madras judgment, above cited. I am of opinion, therefore, that Probate of the Will in

respect of their property or interest bequeathed should not be granted to the respondent. The order of the District Judge must, therefore, be reversed so far.

The question then arises whether Letters of Administration with the Will annexed should be granted to the respondent. She did not apply for this and if she is granted these Letters in respect of the interest bequeathed she will be in substance allowed to amend her application which is a matter of discretion for this Court to permit at this stage. If I was sure that she had a good and substantial case on this point I should be disposed to allow the amendment. But after consideration I am unable to see that she has such a case. In the first place the application would be a most unusual one hardly within the contemplation of the Probate and Administration Act. She is bequeathed a life interest in the income of a fractional part of the testator's property. If Letters of Administration were granted in respect of the estate the appellant as son would have the superior right to them, there being intestate in respect of the estate except the fraction mentioned and he being the nearer heir and the person entitled to the beneficial interest in the property not disposed of by Will. If the Letters are granted only in respect of the fractional interest the other widow would be equally entitled to claim them. In this way if there are a number of small bequests the number of administrators may be indefinitely multiplied. I do not think this is meant by the Act.

The respondent is entitled to the income of the property bequeathed for life and if she is prevented from the enjoyment of it by the heir she may be entitled to be put in possession for such purpose, the remedy she should have asked for instead of the difficult and doubtful one she has claimed. The grant of Probate would not give her possession if she has not got it but only the right to sue for possession.

As I am not satisfied that she has the right to Letters of Administration with the Will annexed in respect of the interest bequeathed to her I decline to permit amendment of her claim or to vary the order of the District Judge by granting her such Letters.

I accept the appeal and dismiss the petitioner's claim for Probate of the Will of her husband without prejudice to her right to enforce her claim under the legacy in the ordinary way. As the case is not free from difficulty I order the parties to pay their own costs throughout.

Appeal accepted.

FULL BENCH.

APPELLATE SIDE.

No. 74.

CIVIL.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Robertson,
and Mr. Justice Shah Din.*

HAMIRA AND OTHERS,—(DEFENDANTS),—APPELLANTS,
versus

RAM SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE NO. 1203 OF 1906.

Custom—Succession—Sister not entitled to succeed as daughter of father of deceased.

Held, that when a proprietor following the Customary Law dies leaving a sister she cannot claim to succeed the land left by him as daughter of his father. She may succeed as sister only when custom recognizes her right as such.

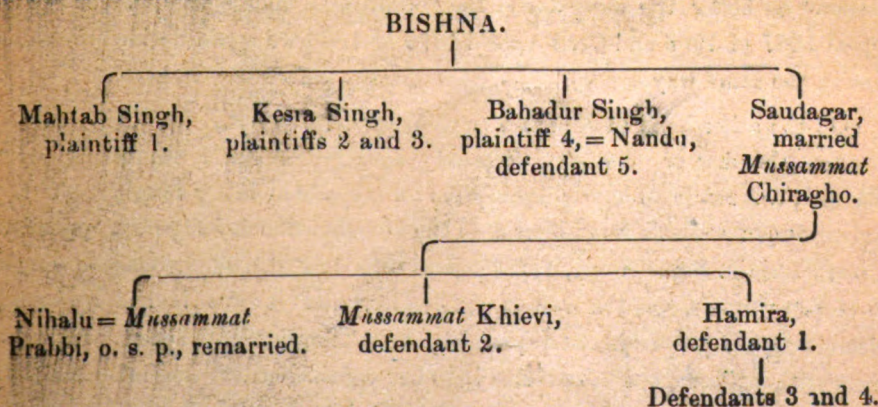
Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 31st March 1906.

Bhagat Gobind Das, Pleader, for Appellants.

Rai Bahadur Bakhshi Sohan Lal, and Pandit Sheo Narain, Pleaders, for Respondents.

ORDER OF REFERENCE TO A FULL BENCH.

JOHNSTONE, J.—(6th May 1907).—In this case the pedigree of the parties is as follows :—



Saudagar having died, leaving a widow, a daughter and a son, the last named succeeded after his death without issue, and on the remarriage of his widow, his widow Chiragho succeeded. Plaintiffs claim the property left by *Mussammat Chiragho* as being the proper heirs of *Nihalu*, last male holder. The property consists of land, house and moveables.

The first Court found that defendant 2 and her sons were better heirs than plaintiffs; that the property is not proved ancestral; that the widow, plaintiff Kirpo, is not entitled to sue, that no moveable property of *Mussammal* Chiragho came to defendants 1 to 4. The suit having been dismissed on these findings, plaintiffs appealed to the learned Divisional Judge, who agreed as to *Mussammal* Kirpo, agreed that the property in suit is not ancestral *qua* plaintiffs, but was acquired by Saudagar, found that the parties follow agricultural custom, and finally held that even as regards acquired immoveable property plaintiffs as collaterals excluded the sister of Nihalu and her husband and sons, the view being taken that plaintiff 2 is to be treated as the sister of the last male holder, Nihal, and not as the daughter of the penultimate male holder, Saudagar. The claim for houses and land was decreed.

This revision petition has been admitted under Section 70 (1) (b) of the Courts Act, the grounds of appeal in effect being that succession did not pass to *Mussammal* Chiragho as mother of Nihalu, but as widow of Saudagar, and that the property should be considered as the property of Saudagar, and should go to his *daughter*, defendant 2, rather than to plaintiffs.

In Civil Appeal 599 of 1904, decided by my learned colleague and myself on 17th July 1905, we pointed out the essential difference between the case of a daughter and the case of a son, and declined to adopt the theory that when a man without brothers dies sonless in a tribe in which daughters excludes collaterals as being the daughter of the penultimate male holder, and in Civil Appeal 1087 of 1906 and Civil Appeal 1370 of 1906 we again decided the same point in the same way.

On the other hand in *Khuda Yur v. Sultan*, 103 P. R., 1900, in which, however, the matter was not discussed directly, a sister contesting with collaterals was taken to have presumption on her side as being daughter of the original owner, and this was followed in the Division Bench Judgment appended to *Daya Ram v. Sohail Singh*, 110 P. R., 1906, (1) F.B. There, Charan Singh, son of Sewa Singh, was the last male holder, and it was laid down that, inasmuch as the property was acquired by Sewa Singh, "on the death of Charan Singh without issue, the inheritance is to be "considered as the inheritance of Sawaya Singh's daughter's son, and not as the inheritance of Charan Singh's sister's son, *Khuda Yur v. Sultan*, 103 P. R., 1900 and other cases quoted by me before." In the judgments recorded by the learned Judges who sat on the Full Bench aforesaid, I find the learned Chief Judge (in connection with the point

(1) s. c., 31 P. L. R., 1907 (F.B.)

now directly before us) merely remarked (page 396)—“Now by Customary Law a sister’s son is frequently put in the same position as a daughter’s son,” and quoted a few rulings. Then Chatterji, J. doubted, page 406, whether a sister’s son could be treated as daughter’s son of the penultimate holder, but left the matter to the Full Bench. Reid, J. gave no opinion on this point, nor did Robertson, J., while Kensington, J. contented himself with remarking, page 413: “That a sister’s sons are, generally speaking, looked on as more remote possible heirs than a daughter’s sons may be readily admitted, certainly where ancestral land is concerned. But cases arise, and *the present seems to me one of them* where no rational distinction can be drawn between the two classes etc.”

Perusal of the Full Bench judgments as a whole shows that this question was not referred to the Full Bench, *and is not one of the points decided by it*. In these circumstances I conceive we have against us the Division Bench ruling appended to *Daya Ram v. Sichel Singh*, 110 P. R., 1906, (1) (F. B.) at page 414, and the *dictum* of Kensington J. which, however, only related to the case then in hand and its peculiar facts. I am still strongly of opinion that the point has been rightly decided in Civil Appeal 599 of 1904, Civil Appeals 1087 and 1370 of 1906 quoted above, and it may therefore be necessary to refer the case to a Full Bench. With these remarks I send the case to my learned colleague.

CHATTERJI, J.—(6th May 1907).—I agree in referring the case to a Full Bench holding the same views as my learned brother.

JUDGMENT OF THE FULL BENCH.

CLARK, C. J.—(26th July 1907).—The question for decision by the Full Bench is this:—

When a proprietor, following the Customary Law of the Punjab, dies leaving no sons but a sister, should, for purposes of inheritance, the sister be regarded as a sister of that proprietor or as a daughter of his father?

That is should her rights of inheritance be those of a daughter and not of a sister?

The question has been fully discussed in Civil Appeal No. 599 of 1904, and we may say at once that we agree with the reasoning and conclusion of that judgment that the sister’s rights are those of a sister and not of a daughter, and we direct that that judgment be published as an appendix to this judgment.

(1) S. C., 31 P. L. R., 1907 (F. B.)

The two main authorities against our view are *Khula Yar v. Sultan*, P. R., 108 of 1900, and the final decision of the Divisional Bench in *Daya Ram v. Soheli Singh*, 110 P. R., 1906, (1) F.B. In neither of these judgments was there any independent discussion of the subject. In *Daya Ram v. Soheli Singh* the controversy on which the Full Bench passed decision was whether the case should be governed by custom or Hindu Law. The case was eventually decided by custom and the principle of the parity of the sister and the daughter was utilized in determining what the custom was.

On an independent consideration of the subject itself we are unable to agree with the views adopted in those judgments. *Musammatt Jaideri v. Harnam Singh*, 117 P. R., 1888, *Gaman v. Musammatt Aman*, 171 P. R., 1888, and *Musammatt Desi v. Lehna Singh*, 46 P. R., 1891, were relied upon as showing that widows succeeded not as mothers of deceased sons, but as widows of their son's father, on the principle that when a line dies out it is treated as if it never existed.

In these cases this principle was used to explain why women should lose their life-estates by remarriage, which they could not have done if they had succeeded as mothers, but we are asked now to extend this principle, and make it a governing principle, which should of itself regulate the law of succession.

We do not think that a principle of this kind can be followed up to all its logical conclusions. If it were, absurd results would follow, a paternal aunt and a grand-paternal aunt would in this case be in the same position as daughters.

A principle that would lead to such absurd conclusions cannot be a sound principle to follow to its ultimate conclusion.

In no system of law, that we are aware of, are the claims of daughters and sisters placed on the same footing, and we cannot imagine that the agriculturists of this province by a subtle train of reasoning would ever have put them on the same footing.

It is then argued that in the special facts of this case the property not being ancestral, and *Musammatt Chiragho*, having inherited as the widow of *Saudagar*, the claims of *Musammatt Khievi* and her sons should prevail.

(1) A. C., 31 P. L. R., 1907 (F.B.)

We are unable to see that any case is made out for departing from the ordinary order of succession of sisters. No instances have occurred on which a custom could be founded.

Our decision is that defendants can only claim to succeed on the strength of *Mussammât Khievi* being the sister of *Nihalu* and not on the strength of her being the daughter of *Saudagar*, and we dismiss the appeal with costs.

Appeal dismissed.

NOTE.—The following is the unpublished case referred in the above judgment.

SAIDAN BIBI AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

versus

FAZAL SHAH AND OTHERS—(DEFENDANTS),—RESPONDENTS.

CASE NO. 599 OF 1904.

Bhagat Gobind Das, Pleader, for Appellants.

Pandit Sheo Narain and *Rai Bahadur Bakhshi Sohan Lal*, Pleaders for Respondents.

JOHNSTONE, J.—(17th July 1907).—In this case plaintiffs, who are sister and sister's son of the last male holder, *Haidar Shah*, claim his land and house as against defendants who are collaterals of *Haidar Shah* in the seventh degree. Both the Courts below have held that custom is in favour of defendants, the burden of proof on the point being on plaintiffs, and so they have dismissed the suit. Two defendants, Nos. 2 and 6, owning (we must take it) $\frac{1}{2}$ and $\frac{1}{4}$ shares respectively, confessed judgment; but the Courts below have ignored this. This point has been raised in further appeal, and to clear the ground we may say at once that we see no reason to refuse the plaintiffs a decree for these two shares. As regards the other shares the questions we have to decide are in effect these—

(a) On which party is the burden of proof?

(b) If on plaintiffs, have they proved any special custom in their favour.

(The issues framed by the first Court are rather confusing; the above shows the lines on which the case has been argued before us).

As regards (a) I need only refer to Section 24, *Rattigan's Digest*, 6th Edition, page 30, to the *Riwaj-i-am* of Revised Settlement, Q.-27, of *Rawalpindi* (which is absolutely uncompromising), and to the rulings in *Faiz-ud-Din v. Mussammât Wajib-unn-nissa*, 71 P.R., 1892, penultimate para., page 255. *Ilahia v. Qasim*, 24 P.R., 1905, (1) *Mussammât Jindwaddi v. Hassan Shah*,

(1) S. C., 42 P.L.R., 1905.

41 P. R., 1895, and *Fulleh Muhammad Khan v. Danlat Khan*, 46 P. R., 1895. There is on the other side the *Wajib-ul-arz Chakkar* of the Regular Settlement, Section 5, which is a little confused and contains some irrelevant matter, but which seems to lay down that *daughters* if married in the family, take *along with* uncles and father's first cousins and their descendants, but if married elsewhere, are excluded by their near collaterals, while nothing is said directly about their competition with more distant collaterals.

The inference doubtless is that they, if married in the family, exclude more distant collaterals, and in the present case plaintiff 2 is married in the family. But the value of this document is considerably weakened by the circumstances that it contains details which can never have been followed, and which are wholly at variance with Punjab agricultural custom. Thus, it says that, where near collaterals exclude daughters, those collaterals share by *shariat*, and also that when daughters, as being married in the family, share with near collaterals, again the shares will be by *shariat*. In my opinion it can safely be stated that such a custom as this never prevailed, and has never been given effect to. There is probably not a man in the village who could make a division of property according to strict Muhammadan Law, or who understands its elaborate rules. Thus, it would appear that the compilers of this section of the *Wajib-ul-arz* must have been to some extent drawing upon their imagination.

Another reason for holding that this document affords no rule and raises up no presumption in favour of the plaintiffs in the present cases is that it deals with daughters only. In this connection the learned pleader for the plaintiffs argues ingenuously enough that plaintiff 1 claims not so much as sister of Haidar Shah as in the capacity of daughter of Alaf Shah. Alaf Shah died and was succeeded by his son, Haidar Shah, who died without issue or widow, and was succeeded by his mother, *Munnammat Azim Kali*. It is contended that upon the death of this lady we should look at Alaf Shah, her deceased husband, and see who *his* heir is, and that thus the contest is between a daughter, plaintiff 1, and the defendants. It is also said that, even if we have to find the heir of Haidar Shah, undoubtedly the last male holder, we should go up the line to his father and then come down to plaintiff 2, his daughter. In support of this

argument we are referred to *Gholam Muhammad v. Muhammad Bakhsh*, 4 P. R., 1891, F.B., at page 17, penultimate para.; where the right of representation is explained, to the middle para. at page 62 in *Sila Ram v. Raja Ram*, 12 P. R., 1892, F.B., and especially the words "a mother succeeds, not as a mother, but as the widow of the father" to pages 256, 257 in *Faiz-ul-Din v. Mussammatal Wajub-un-nissa*, 71 P. R., 1892, 1st para. of page 256, where in a manner the case of succession of a sister is assimilated to that of a daughter by the device of going back to the father from the brother and then coming down to the sister; to *Gaman v. Mussammatal Aman*, 171 P. R., 1888, and especially the words "the general principle is that where a line dies out, it is treated as if it never existed." Now if it was the function of the Court, when it had evolved a theory, which explains certain phenomena of custom, to insist upon applying that theory, wherever it could logically be applied regardless of facts, no doubt there would be much to be said in favour of the above argument; but it is rather our function, in matter of disputed custom, to discover what the actual practice is and give effect to our discoveries. There is no binding force or sanctity in the theory itself; it is merely a convenient method of giving order to our thoughts. In the present instance, as we have already seen, daughters and sisters have not commonly or in practice ever been treated as being on a similar footing. The theory has never been put forward to support the claims, for instance of a paternal aunt against distant collaterals, such a claim has in my experience never been made. We have only to compare Section 23 of Rattigan's Digest with section 24 to see how differently the respective claims of daughters and sisters have been treated in the past; perusal of Chief Court rulings, of which there are scores, dealing with daughters and sisters brings out the same tale; in no *Wajib-ul-arz* or *Riwaj-i-am*, with which I am acquainted, are sisters treated as the daughters of their brothers' fathers and not as sisters; and lastly even *Faiz-ul-din v. Mussammatal Wajub-un-nissa*, 71 P. R., 1892, quoted above, we have only to look at the last two lines of page 255 and the opening lines of the next page to see how purely academic are the abstract remarks on pages 256 and 257 relied on by the plaintiffs' pleader.

My general conclusion, then is, that the burden of proof is on plaintiffs to prove a special custom in their favour, even against collaterals of the seventh degree I should say even that, initially, the burden of proof would be upon them when they are contesting with ascertained collaterals however distant.

I also hold that rules and practice relating to daughters have no bearing on the present case ; for reasons which we can conjecture but which need not, for our purpose, be ascertained, daughters' claims have been largely recognised and sisters' claims have not.

Turning, then, to the evidence in the case we find that most of it relates to daughters and so is irrelevant. The essential difference between the position of a daughter and that of a sister has been pointed out in *Ilam Din v. Mubarak*, 140 P. R., 1899, last para., page 547. Virtually only three instances of succession of sisters to be found—cases 10, 12 and 16 in plaintiffs' list—and the evidence regarding them is meagre and unsatisfactory. In one of them it is said by a witness that there was a gift. In one the event is said to have happened in Sikh times and the evidence is purely oral. Even as regards daughters the right of succession has apparently been so insecure that in nearly all the ascertained instances there have been gifts. The rulings we have been referred to—*Musammal Fatima v. Ghulam Muhammad Shah*, 172 P. R., 1889, and so forth—are all concerned with daughters.

The matter of *res-judicata* with reference to the litigation of 1876 has not been argued before us, and I do not think I need touch it. I would, if my learned colleague agrees, dismiss the appeal except as regards the shares of defendants 2 and 6, for which plaintiffs should have a decree. I would make the parties bear their own costs throughout as the case was one not free from doubt.

CHATTERJI, J.—(11TH JULY 1907.)—I agree in the foregoing judgment though with some reluctance as the parties belong to an endogamous tribe and the respondents are remote agnates of the seventh degree. But there can be no doubt that customary law does make a distinction in practice between a sister and a daughter which cannot be got over by any theory that succession has to be traced to the last male owner who left issue, whatever value it may have to explain or illustrate the general principles regulating succession in that law. Besides no system of law is faultlessly logical and anomalous and even absurd distinctions can be found in almost all. Concrete facts must always prevail over abstract theories. Robertson's *Customary Law of the Rawalpindi District*, answer to question 27, is entirely against the plaintiffs, and enquiry in this case, which was full, failed to bring out any appreciable number of precedents in favour of the sister.

The appeal will be dismissed except as regards the shares of defendants 2 and 6 for which plaintiffs will have a decree, but the parties will pay their own costs throughout.

Appeal dismissed.

APPELLATE SIDE.

No. 75.

CIVIL.

Before Mr. Justice Johnstone.

ROUSHAN,—(DEFENDANT)—PETITIONER,

versus

MAKHAN,—(PLAINTIFF)—RESPONDENT.

CASE No 372 OF 1905.

Pre-emption—Transfer by vendee before suit for pre-emption is filed—Right of pre-emptor, who has obtained decree against vendee alone, to sue transferee—Limitation Act (XV of 1877), Schedule II, Article 10.

The vendee exchanged some of the land purchased by him with the land belonging to the present defendants. Subsequently the plaintiff obtained a decree against the vendee alone by right of pre-emption for possession of the land purchased by him. Not being able to obtain possession of the land transferred by the vendee to the present defendants, the plaintiff filed the present suit against them.

Held, that the suit must be regarded as one for pre-emption, and not having been filed within the period of limitation prescribed therefor must be dismissed as barred by limitation.

Petition for revision of the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 24th November 1904.

Mr. Roushan Lal, Advocate, and Lala Gopal Chand, Pleader for Petitioner.

Mr. Ganpat Rai, Advocate for Respondent.

JUDGMENT.

JOHNSTONE, J.—(30th October 1906).—In this case, one Makhan sued Wahid, vendee, and his vendor, for pre-emption of a certain area of land. The sale took place on 30th January 1900, and the suit was instituted on 28th January 1901. Before this, one Dulo had sued the same persons for pre-emption on 19th January 1901, and obtained a decree on 28th June 1901, which he never executed. Makhan got his decree on 8th April 1902. Before any suit, on 9th May 1900, mutation of a part of the land had been sanctioned in favour of Dasaundhi and Roushan on the basis of an exchange with the vendee, notice of which had been given to the *patwari* on 14th April 1900, the usual proclamation following. Similarly, notice had been given to the *patwari* of the transfer by way of exchange of a further portion of the land to Gahna by vendee on 13th December 1900, and mutation was sanctioned four days later. Further, on 13th November 1901, in the course of Makhan's pre-emption suit the exchanges were clearly mentioned; but plaintiff did not have the transferers impleaded.

Having secured his decree, plaintiff Makhan proceeded to execution, and, of course, easily got possession of so much of the land as remained in the hands of the vendees, but possession of the land in the hands of the aforesaid transferers was refused by the holders under circumstances stated at length by the Divisional Judge. On this plaintiff brought this separate suit against vendee and transferers, and the first Court framing the following issues :—

I. Was the plaintiff's application for execution against the transferers rejected and so this suit barred ?

II. Can the plaintiff object to the exchanges, seeing they were made before institution of his pre-emption suit ?

III. Does Section 13, Civil Procedure Code, bar this suit as regards the vendee ?

IV. To what relief is plaintiff entitled ?

Held, that Section 13, Civil Procedure Code, barred this suit as against defendant No. 1 (vendee) ; that the exchanges were invalid as being made before expiry of the period for pre-emption ; that thus the transferers are mere trespassers; and that plaintiff must have a decree for the land against them.

The transferers appealed to the Divisional Court, which held—(1) that a separate suit, and not an appeal against the order refusing possession by execution, was the proper course, inasmuch as there had been no obstruction or resistance, and so Section 331, Civil Procedure Code, had no application ; (2) that the present suit is not one for pre-emption, inasmuch as the plaintiff has already got his decree for pre-emption and, having paid the price fixed by the Court, stands already in the shoes of the vendee, the proprietary right vesting in him as from date of sale ; (3) that therefore all transfers made after sale are invalid against plaintiff, and the transferers are mere trespassers.

The Divisional Judge having thus dismissed the appeal, the transferers came up here on the revision side under Section 70 (1) (b), Punjab Courts Act. For them Mr. Roshan Lal contents himself with urging that plaintiff is entitled, as regards this land, to sue only by way of pre-emption ; that the previous suit in no way affects his clients who were not parties ; that, taken as a pre-emption suit, the present suit is out of time ; and he relies upon the remarks in *Nabi Bakhsh v. Fakir Muhammad*, 25 P. R., 1903⁽¹⁾ at page 81, 2nd paragraph.

Mr. Ganpat Rai for plaintiff contends : (1) that the exchanges were " collusive," though he does not say they were fictitious ; (2) that the

(1) S. C. 74 P. L. R., 1903,

title of the vendee at time of the exchanges was a "defective" title, and so the transfers effected in favour of appellants are voidable at the instance of the plaintiff, *Bogha Singh v. Gurmukh Singh*, 93 P. R., 1902 F. B. page 419, and *Hakim Singh v. Indar*, 46 P. R., 1902⁽²⁾ page 165, (3) that transferers are thus mere trespassers; (4) that the second transfer in Nabi Bakhsh's case was by way of sale, not of exchanges, and so that ruling is inapplicable, and so forth.

After considering the arguments and the authorities, I have no doubt that Nabi Bakhsh's case is fully in point. I hold that plaintiff has, even as against the *transferers*, no suit except by way of pre-emption. Had they been impleaded in the previous suit, they could certainly have set up any defences the vendee might have set up, and plaintiff cannot, by keeping them out of that suit, deprive them of the right to make these defences. What title is it that the transferers took upon their exchanges? They took the same title as the vendee had—see page 420, middle of *Bogha Singh v. Gurmukh Singh*, 93 P. R., 1902, F. B. already quoted—which included the right to resist the pre-emptor's claim on all or any appropriate grounds. Plaintiff must, even as against the transferers, prove (or get them to admit) his suit to be within time under Article 10, Schedule II, Limitation Act, 1877; must prove that his right of pre-emption is superior to that of the vendee, and so forth. Clearly then any suit against the transferers by plaintiff must amount to a pre-emption suit. The suit is therefore time-barred.

This shows that the transferers are not mere trespassers any more than the vendee was, and that the transfers are not voidable or void at the mere option of plaintiff, *apart from proof as against the transferers* that the plaintiff's right of pre-emption is superior to that of the vendee and is enforceable against him; and also that the case of Nabi Bakhsh (1903) is not distinguishable as the plaintiff seeks to distinguish it. The assertion that the exchanges were "collusive" is beside the mark. It makes no difference in the case even if we assume the transfers were effected to defeat pre-emption, and, further, there is no evidence of "collusion."

The fact is that plaintiff had ample opportunity to implead the transferers before the suit was barred against them, but he was badly advised and now has lost his rights.

I allow the petition and, setting aside the findings and decree of the Courts below, I dismiss plaintiff's suit with costs throughout

Application allowed.

(1) s. c. 49 P. L. R., 1902.

REVISION SIDE.

No. 76.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

PURAN,—(PLAINTIFF),—PETITIONER,

versus

MAMUN,—(DEFENDANT),—RESPONDENT.

CASE No. 1001 OF 1906.

Punjab Tenancy Act (XVI of 1887), Sections 59, 111, 112—Landlord and Tenant—Occupancy rights—Succession—Wajib-ul-arz. Effect of entry in—

He'd, that the provisions of Sections 111 and 112 of the Punjab Tenancy Act override Section 59 of the Act, and an entry in a *Wajib-ul-arz* prior to 1871 with respect to the succession to land in which a right of occupancy exists has the force of an agreement.

Parties can by written agreement settle on a law of succession different from the succession prescribed in the Act.

Petition for revision of the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 12th January 1906.

Mr. Shah Nawaz, Advocate for Petitioner.

Mr. Miran Bakhsh, Advocate for Respondent.

JUDGMENT.

CLARK, C. J.—(11th January 1907.)—The facts of this case are given in the judgment of the Divisional Judge which runs as follows :—

“ Mamun, defendant, and Ata Muhammad, defendant, are sons of Jhande Khan, and the other defendants are descendants of Ranjhe Khan.

“ Suba was occupancy tenant of fields Nos. 586 and 662, at his death, and was succeeded by his widow *Mussammât Bego*.

“ *Mussammât Bego* having died, the defendants have taken possession of these fields and mutation has taken place in their favour as heirs of Suba.

“ The proprietors of the land now sue to eject defendants as trespassers and claim possession of these two fields. Defendants allege that Jhande Khan, Suba and Ranjhe Khan were brothers and sons of Murad Khan, who at one time occupied the land.

There is a clear provision in the *Wajib-ul-arz* of the Settlement of 1852 and in the *Wajib-ul-arz* of the Settlement of 1884, which gives the right of succession among occupancy tenants to collaterals whether or not the common ancestor held the land. Thus Section 59 of Tenancy Act does not apply, and if defendants are collaterals of Suba, they are entitled by Sections 111 and 112 of the Tenancy Act to succeed to the land under the clause in the *Wajib-ul-arz*.

"The lower Court has held that defendants are not collaterals of Suba, chiefly on the ground that Mamun, defendant, when shown in the Settlement record as agent of *Mussammat* Bego, is described as her 'bradarzada,' but it is clear that the word 'bradarzada,' was not intended to mean 'son of Bego's brother' but referred to the relationship between Mamun and *Mussammat* Bego's husband. I have sent for and examined the Settlement records of 1851 and 1884."

"It is true that at the first Settlement of 1852 the names of Jhande Khan, his sons or Suba were not included among the occupancy tenants of the village. It is also true that Ranjhe Khan's father's name cannot be found in the old Settlement records, and that though Ranjhe Khan's sons at the Settlement of 1852 were occupancy tenants in the village, and held a part of the land now in dispute with other land, they did not hold the whole of the land in dispute. Field No. 586 formed part of old field No. 572, which at the Settlement of 1852 was held by Ranjhe Khan's sons, but No. 662, which corresponds to old Nos. 569, 553, 557, 552 and *min* 556, was in the possession of the proprietors (*khudkasht*) at the Settlement of 1852."

"It is not clear how Suba came into possession of land as occupancy tenant, but it cannot be disputed that after Settlement of 1852 he was recorded as occupancy tenant of land which he got partly from Ranjhe Khan's sons and partly from the proprietors."

"In 1878 mutation proceedings took place by which Jhande Khan became recorded occupancy tenant of half the land which was then in possession of Suba. These mutation proceedings show that Jhande Khan and Suba were brothers and sons of Murad Khan, and the proprietors whose statement was recorded admitted Jhande Khan's right as co-sharer with his brother, saying that his name had been omitted from the revenue records owing to his absence on service when they were prepared."

"Thus there is no doubt that Mamun and Ata Muhammad are nephews of Suba, and as it is not likely that they would admit the descendants of Ranjhe Khan as co-heirs with themselves to Suba unless Ranjhe Khan had been Suba's brother, and as one of the fields left by Suba was held by Ranjhe Khan's sons at the Settlement of 1852, and hence was probably at one time held by a common ancestor of Suba and Ranjhe Khan, I see no reason to doubt that all the defendants are collaterals of Suba."

" With reference to my order of 23rd October 1905 I do not consider it necessary to award special costs for the adjournment on that date. Neither party can be held responsible for the adjournment, because without adjourning I could not have examined the Settlement Records, and without examining the original Settlement records I could not have decided the appeal.

" I accept the appeal and, reversing the lower Court's decree, I dismiss the plaintiff's suit with costs throughout."

He holds that under the entries in the *Wajib-ul-arz* of 1852 and 1884 there is a special agreement as regards succession to occupancy rights, over-riding the law laid down in Section 59 of the Punjab Tenancy Act, and that under this agreement collaterals succeed whether or not the land was held by the common ancestor of the claimant and the last occupant of the land.

It becomes necessary therefore to consider carefully Sections 111 and 112 of the Tenancy Act.

These sections are an amendment of Section 2 of the Tenancy Act of 1868, and are with reference to the question of how far parties should be allowed to contract themselves out of the terms of the Act, either by existing or future contracts. Section 2 of the old Act saved all written agreements between landlords and tenants, and gave the force of agreements to all entries in Settlement records made and sanctioned prior to the year 1871 as regards question of rent, ejectment, alienation and succession and compensation. The intention of the Act of 1887 was to curtail the right of persons to contract themselves out of the terms of the Act especially as regards rent, ejectment and compensation, but the validity given by the law of 1868 to entries in the Settlement records prior to 1871 was maintained, and the right of persons in future to contract themselves out of the terms of the Act, except as regards the matters noticed above, was declared.

Parties can therefore by written agreement, either prior or subsequent to 1871, settle on a law of succession different from the succession prescribed in the Act.

In this case we have to consider the effect of the entry in the *Wajib-ul-arz* of 1852 (prior to 1871) and the effect of the entry in the *Wajib-ul-arz* of 1884 (subsequent to 1871), i.e., whether they are agreements or not. The wording of Section 112 is that an entry prior to 1871 with respect to the succession to land in which a *right of occupancy subsists* is an agreement.

In 1852 Suba had a right of occupancy only in field No. 586, and none in No. 662, which was held by the proprietors in their own hands. It is therefore only as regards No. 586 that the entry amounts to an agreement; it does not constitute an agreement as regards No. 662 in which at the time no right of occupancy subsisted. I think that the word "subsists" refers to subsisting at the time of making the entry, and does not refer to land in which occupancy rights were subsequently acquired and subsisted at the time of the suit.

As regards No. 662 we have to consider whether the entry in the *Wajib-ul-arz* of 1884 Settlement is an agreement.

This question is discussed at some length in *Dilsukh Ram v. Nathu Singh*, 98 P. R., 1894 F. B., at page 356. The reasoning there is, I think, correct; there was no intention of the parties to enter into an agreement in the sense of mutual promises; there was only an expression of opinion that the succession should follow a particular course.

I therefore hold that there was no agreement in the *Wajib-ul-arz* of 1884, and the course of succession laid down in Section 59 of the Tenancy Act must prevail as regards field No. 662.

I, therefore, accept the appeal so far as to decree the suit as regards field No. 662, and dismiss it as regards field No. 586.

Parties will bear their own costs throughout.

Appeal allowed.

APPELLATE SIDE.

No. 77.

CRIMINAL.

Before Sir William Clark, Kt., Chief Judge.

SHIB DAS,—(CONVICT),—APPELLANT,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 269 OF 1907.

Penal Code (Act XLV of 1860), Sections 304, 323,—Hurt—Culpable homicide—Proof—Benefit of doubt—Police putting pressure on witnesses.

The accused was convicted of an offence under section 304, Indian Penal Code, for having stabbed a person with a knife. The occurrence took place between 8 and 9 p. m., in a lane in the City of Lahore. It was dark except for a street lamp in the neighbourhood. It appeared that there were at least five men struggling with deceased and it was difficult to be sure that the witnesses could in fact see who stabbed the deceased. It was found 'that great pressure had been brought by the Police to bear on the witnesses to make them give evidence as desired.'

The Chief Court set aside the conviction, under section 304 Indian Penal Code, and altered it to one under section 323 Indian Penal Code.

Appeal from the order of H. P. Tollinton, Esquire, Sessions Judge, Lahore Division, dated the 15th April 1907, convicting the appellant.

Mr. Ganpat Rai, Advocate for Appellant.

JUDGMENT.

CLARK, C. J.—(4th June, 1907).—The sentence passed against Shib Das, accused 5, rests on the proof that it was he who stabbed Ram Kishen with a knife. The occurrence took place between 8 and 9 p. m. on 16th October 1906 in a lane off the Jouri Mori Bazar. It was dark except for a street lamp in the neighbourhood. There were at least five men struggling with deceased; it is difficult to be sure that the witnesses could in fact see who stabbed deceased. *Great pressure has been brought by the Police to bear on the witnesses to make them give evidence as desired.* See evidence of witnesses, Nos. 8, 10, 12. Shib Das and his two brothers were not the original combatants; they came up after the fight had commenced and it is not very clear why one of them should have used a knife.

The main witnesses against Shib Das are Maharaj Kishen and Jaggat Ram (witnesses Nos. 8 and 10) and Hosain Bakhsh and Ahmed Bakhsh (witnesses, Nos. 13 and 14). *These latter appear to be two roughs that deceased took with him, when he went to have it out with Mehr Chand.*

The street lamp is some 24 feet down the lane from where it joins the bazar.

The evidence of the two former witnesses is that accused Nos. 1 and 2 were fighting with deceased near the lamp, then accused Nos. 3, 4 and 5 came up there; and accused No. 5 then struck deceased and blood came out. They did not see the knife, they then dragged the deceased to where the lane débouched into the Bazar, and threw him into the drain there.

The story of the latter two witnesses (Hosain Bakhsh and Ahmed Bakhsh) is that the original fight took place between accused and deceased somewhere near the lamp, then they proceeded in carrying off deceased as far as the Bazar, and it was then that accused Nos. 1 to 3 came up, and accused No. 3 stabbed deceased. The evidence of these two groups is therefore different in essentials and gives different accounts of what happened.

The evidence of Beni Ram, witness No. 16, is to the effect that accused Nos. 3 to 5 came up after deceased had been wounded, and while

Hosaina was trying to lift him, and then pursued Hosaina. The evidence of Kushal Chand (witness No. 12) is to the effect that there was a considerable crowd along with accused Nos. 3 to 5 pulling the deceased along the lane; he could not see what was happening, and it would be difficult for any one in a crowd like that, in the dark, to see what actually happened, and who struck the fatal blow.

I agree with the view of the assessors that it is not more than a probability that it was Shib Das who struck the fatal blow.

I, therefore, accept the appeal and set aside the conviction under Section 304, Indian Penal Code.

Shib Das is on the same footing as his brothers and I convict him under Section 323, Indian Penal Code, and I sentence him to two months' rigorous imprisonment and Rs. 20 fine: in default one month's further rigorous imprisonment.

*Appeal accepted,
conviction altered.*

APPELLATE SIDE.

No. 78.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

ILAHI BAKHSH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

THE COURT OF WARDS OF THE
PROPERTY OF Khan Bahadur } —(DEFENDANT)—RESPONDENT.
Makhdum HASSAN BAKHSH,

CASE No. 694 OF 1907.

Muhammadan Law—Wakf—Dedication—User—Graveyard—Alienation of land pertaining to graveyard—Civil Procedure Code (Act XIV of 1882), Sections 30 and 539—Suit by members of a community—Individual rights.

The plaintiffs, some Muhammadans of Multan City, sued the Court of Wards representing the estate of *Khan Bahadur Makhdum Hassan Bakhsh* for a declaration that the land in suit situate in *Mauza Taraf Daria, Tahsil Multan*, was a graveyard in possession of the Muhammadan community, and for an injunction restraining the defendant from transferring any part of the land. It was alleged by the plaintiffs that the whole of the land in suit was the graveyard known as *Mai Pak Daman* and was *wakf* and inalienable.

Held, that the plaintiffs had proved that the land in suit was graveyard known as *Mai Pak Daman* and was *wakf* by user, if not by dedication.

That user, as such, does not deprive the owner of his title, but the title remains subject to the user of the land as *wakf*. *I. L. R., XXVI Bom., 198 referred to.*

That the plaintiffs, as members of the Muhammadan community, were competent to institute the suit, and sections 80 and 539 of the Civil Procedure Code did not apply to the case, that it was not necessary for each plaintiff to show that he had used the graveyard; a newcomer, for instance, if a Muhammadan, had an equal right with the oldest residents.

That by the fact that previously some portions of the land pertaining to the graveyard had been alienated without objection on the part of any one, the plaintiffs did not lose their right to object to further alienation.

First appeal from the decree of M. H. Harrison, Esquire, District Judge, Multan, dated the 15th April 1907, dismissing the plaintiffs' claim.

Messrs. Muhammad Shafi and Shah Nawaz, Advocates, for Appellants.

Mr. Parker, Advocate, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(16th December 1907.)—This is a first appeal against a decree of the District Judge of Multan. The plaintiffs are miscellaneous Muhammadans of Multan City and the defendant is the Court of Wards as representing the estate of *Khan Bahadur Makhdum Hassan Bakhsh*, caste *Kureshi*. In August 1905 the defendant Court announced by beat of drum its intention to sell by auction certain portions of land out of* *khasra* Nos. 1064, 1069, 1081, 1225, 1227, 1231, 1300, 1306 and 1336, amounting to 86 *kanals* 15 *marlas* in all, for the benefit of the *Makhdum's* estate. Upon this the suit was filed on 9th December 1905, plaintiffs asking for a declaration (in amended plaint) that some 438 *kanals* 9 *marlas* of land, whereof the numbers are given, being a graveyard, is in possession of the Muhammadan community, and also asking for an injunction restraining defendant from transferring any part of the said land.

Defendant raised a variety of pleas regarding the right of plaintiffs to sue jointly, regarding their having no cause of action as to the ground not mentioned in the sale proclamation, regarding inadequacy of Court fee, regarding plaintiffs' *locus standi* to sue, regarding the competency of such a suit in view of Section 42, Specific Relief Act, regarding certain persons who have not been impleaded as defendants though they occupy parts of one of the *khasra* numbers in suit, regarding the land not being *wakf*, regarding possession being with defendant and not with the Muhammadan community, regarding the

* See amended plaint, page 10 paper-book and the proclamation.

question whether the actual graveyards and the "clear land" are separate, and regarding past transfers by the defendant's ward and his father.

The learned District Judge has found against the plaintiffs. He has held that the plaint is properly stamped; that the missing persons aforesaid need not be impleaded; that within the land in suit are scattered graveyards with "clear lands" between; that sales of land within these numbers have been made in the past though the numbers were in the Settlement of 1880 shown as *ghair mumkin kabaristan* notably the land sold to Government for a Railway Station; that there was no dedication of the whole land as *wakf*; and no declaration that whole was *wakf*; that it is not proved that the Muhammadan community is in possession of the land as a whole, and it is proved that the defendant is in possession, though he does not wish to interfere with actual graves; that defendant has a right to alienate at will the clear spaces; that the plaintiffs have not shown that they are individually affected, or that their families are affected by the proposed sale; or that they have the right to bury their dead in the lands to be sold; that therefore they cannot properly sue in respect of the whole land described in the plaint; and (apparently) that they cannot sue jointly.

The appeal has been argued before us at considerable length and with much ability on both sides; and after giving the arguments and the record the best consideration we can, we have arrived at the conclusion that the appeal must succeed.

Briefly put, the main contention of plaintiffs is that the whole of the land in suit is the graveyard known as Mai Pak Daman, and is *wakf* and so inalienable. The main reply to this on the other side is that the land actually under graves may be inalienable, but that the land to be sold is not proved to belong to Mai Pak Daman. Mr. Shafi also contends for plaintiffs that, even if any of the land to be sold or in suit is not positively proved to be within the limits of Mai Pak Daman, it is still all *wakf*.

The first point in favour of plaintiffs is that all along in the Revenue records the land in suit has been shown as *Makbura-i-Ahl-i-Islam*. Next in 1858, the Muhammadans of Multan and of the surrounding country began to consider the question of suitable sites for burial grounds. Up to that time apparently there was virtually no restriction on burials. A representative public meeting having been

called, and a certain decision arrived at, an application to the Commissioner of the Division was drawn up and presented by the father of the present *Mukhlum* and by one Haji Ghulam Mustafa Khakwani. The proposal was that owners of *khankahs* should keep open graveyards in their own *khankahs*; that four old graveyards (of which Mai Pak Daman's was one) should be kept open *for the whole Muhammadan community*; that three new graveyards (at Darya Manj, near Ram Tirath, and near Sabir Miani) should be started; and that all other graveyards should be closed.

Again, in 1867 the Mussalman *Raisas* of Multan City made an application to the Deputy Commissioner, Multan, to the effect that the graveyard of Pir Umar (one of the four old graveyards mentioned above) should be demarcated and protected from encroachment, and certain other graveyards, among which is Mai Pak Daman, should be kept open. In this application a remark occurs which is specially useful as showing what was intended when a given area was stated to be a graveyard, *viz*: "There are many plots of land lying vacant "within and around the graveyard which will supply ample room "for dead bodies." The importance of this will shortly be explained.

Next, on 22nd August 1867 we have a *robkar* of the Deputy Commissioner, which recites the order of Commissioner of 1858, sanctioning the proposals of that year, and shews that all graveyards, except the seven named and the *khankah* graveyards, should be kept closed. Lastly, on 22nd September 1867, a Revenue Officer sends a *robkar* to the Deputy Commissioner intimating that a *parwana* on the subject has been issued to the Tahsildar, and also that a copy is being sent to the District Superintendent, Police, to let him know that, if any Muhammadan buries a corpse outside the authorised places, it should be exhumed and reburied in one of those places.

The origin of the Pak Daman graveyard is very ancient. Bahawal Hakk, the famous saint, was born in the 12th century of the Christian era. He had a son, Sadr-ud-din, whose wife was called Mai Pak Daman. She was revered as a saint, and her body was buried in a shrine within the area in suit. No one can tell when the surrounding land was definitely set aside as *wakf*; but we can safely conjecture that in the first instance Mussalmans began to bury their dead here and there in the waste land about her tomb because of the desire to be buried near the body of a saint. There can be no doubt that for hundreds

of years the land about her tomb has been used as a burial ground; and though there is no direct proof of dedication as *wakf*, we can safely conclude that long before 1858 it had become *wakf*, at least by user. (compare *I. L. R.*, XXXIII Cal., 1290; XIX Cal., 203; XXV All., 418; 2 M. I. A. 390; M. N. All., 1903 page 74). Then, in 1858, this status of *wakf* was fully recognised as we have seen. No doubt user as such does not deprive the owner of his title, but the title remains subject to the user of the land as *wakf*.—*I. L. R.*, XXVI Bom., 198.

This disposes of the more general question, and the next point is what area was *wakf*. Our view is that at least all the area in suit was. The area in suit is between 50 and 60 acres in extent. At no time has the whole of it been at once covered with palpable graves; but this does not any the less make the whole a graveyard. One clan or family would bury their dead one by one in one spot, and another in another. The graves in these clusters of graves would grow in numbers as the clan increased, but continually old graves would be forgotten and would be levelled with the ground by the weather; and, if a family died out, its cluster of graves would in a few years become effaced. There would naturally be spaces clear of graves (or of known graves) between the clusters of graves of this clan and of that clan, providing room for new burials; and hence we find the state of affairs, which is used by the defendant's counsel as an argument in favour of his client, *viz.*, that in the area in suit are very many separate graveyards, one occupied by butchers, one by weavers, one by *zamindars*, and so forth. In reality these are not separate graveyards, but only separate clusters of graves in one big area forming a single graveyard. These clusters are not known to the Revenue authorities or to the people by distinctive names. Further, it is peculiarly necessary that the clear spaces should not be appropriated for other purposes, inasmuch as all burying of bodies outside of the seven authorized areas aforesaid has been prohibited. This was fully recognized in 1867, *vide* the application of that year by the *raises* of Multan mentioned above. To hold that the clear spaces are at the disposal of the defendant would amount to a closure of the graveyard as a whole, for such spaces are necessary if any more burials are to be made. Again, there is evidence that in more than one clear space on digging up the soil human bones have been found, showing that these spaces have in past centuries been used for burials. We would hold, then, that the whole area intended in 1858 to be reserved

as a graveyard under the name of Mai Pak Daman is *waqf* by user, it not by dedication, and that even the clear spaces in that area are inalienable by defendant; but Mr. Parker goes on to argue that none of the land proposed to be sold is really within that area. In the Revenue records none of the land in suit is called after Mai Pak Daman, which name does not seem to have been used at all; but all the *khassra* numbers are described as *kabaristan* or *ghair mumkin kabaristan*. In our opinion this is sufficient. In 1858 it was settled that the only *kabaristans* (outside of *khankahs*) were to be the seven aforesaid. It is not pretended that the land proposed to be sold is in any other one of those seven, and the land in suit generally is admitted to be in the Pak Daman cemetery. The land to be sold adjoins the land admittedly in Pak Daman; and thus the conclusion is irresistible, unless the Revenue records are incorrect, that the lands to be sold also belong to the Pak Daman lands. Mr. Parker's reference to Exhibit P. 13, extract from Settlement map of 1880, is useless. It is only an extract, and the mere fact that it only shows land between the two roads and excludes some of the land in suit proves nothing; for it is not authoritatively a map showing the exact limits of Pak Daman cemetery. Indeed no map exists, so far as we know, which does shew those limits as such; all we know is that the Settlement map of 1880 clearly shews that each and every *khassra* number in suit has graves in it, though of course not all over it. It may be that Exhibit P-13 was put forward by plaintiffs as showing the Pak Daman cemetery; but it was an incomplete extract, and plaintiffs are not bound by it.

The *onus* being thus on defendant to shew that, as a matter of fact, the land to be sold is not *kabaristan*, I am unable to see that he has discharged that *onus*.

Mr. Parker then argued that inasmuch as no proceedings have been taken under Section 30 or Section 539, Civil Procedure Code, the plaintiffs must sue only on their individual rights of burial, and as a matter of fact plaintiffs have not gone into the witness box, and have not shewn that any member of their several families has ever been buried in the land in suit. In support of this argument Mr. Parker cited several rulings, which we have noted below* but they do not really help. Plaintiffs sue as members of the Muhammadan community, each and every member of which is entitled to bury his dead any-

**I. L. R.*, XXIV Cal., 385; XXIII Mad., 28; XXXIII Cal., 905 (at page 907) XVIII Bom., 699; 37 P. R., 1892; 66 P. R., 1892; 29 P. R., 1897.

where in the whole graveya d Mai Pak Daman. It is not necessary for such a member to shew that he *has* used the graveyard; a new-comer, for instance, if a Muhammadan, has an equal right with the oldest resident

Only two further minor arguments used by Mr. Parker need be noticed. He contends that such land has been left for extension and only some 11 acres are to be sold. This is immaterial, in our opinion. The whole is *wakf*. Again, he argues that the *Makhdum* and his father have in the past made repeated alienations of portions of land included within Pak Daman, and the Muhammadan community having raised no objections plaintiffs cannot now contest the present proposed sale. Mr. Shafi has fully satisfied us that illegal acts by defendant in the past do not deprive plaintiffs in such cases of their rights; the community may from apathy or because of some countervailing advantage have acquiesced in alienations being made in and in buildings being erected upon the land of the cemetery, and yet it does not lose its right to object to further alienations. In this connection we need only refer to Amir Ali's book, 3rd Edition, page 375, last para, and page 381. As regards another part of this argument, *viz.*, that the alleged levy by the *Makhdum* of one pice per burial as a fee shews exercise of dominion over the land, we need only remark that the evidence seems to shew that *fakirs* take these fees and not the *Makhdum*, and if these men take these fees, as *mujawars*, as Mr. Parker suggests, then the income goes to the shrine and not to the *Makhdum* in person, and therefore no inference in defendant's favour can be drawn from the circumstance.

We accept the appeal and decree the claim in full. But, considering everything, we make the parties bear their own costs.

Appeal accepted.

FULL BENCH.

APPELLATE SIDE.

NO. 79.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., Mr. Justice Robertson and Mr. Justice Rattigan.

JALLA, AND OTHERS,--(DEFENDANTS),--APPELLANTS,

versus

GEHNA, AND OTHERS,--(PLAINTIFFS),--RESPONDENTS.

CASE NO. 53 OF 1905.

Punjab Courts Act (XVIII of 1884), Section 40 (1), (b)—Valuation of suit—Further appeal—Suit for declaration that alienation of land is not binding on the plaintiff after the alienor's death.

Held, by the Full Bench, that for purposes of further appeal under section 40 (1) (b) of the Punjab Courts Act, the value of a suit for a declaration that an alienation of ancestral land assessed with revenue by a male proprietor is not binding on the plaintiff after the alienor's death is thirty times the revenue and not the amount of the consideration for the alienation.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 19th October 1904.

Mr. Duni Chand, Advocate, for Appellants.

Lala Tirath Ram, Pleader, for Respondents.

ORDER OF REFERENCE TO A FULL BENCH.

ROBERTSON, J.—The facts of this case are as follows: Plaintiff sued for declaration to the effect that a sale of land, effected by their father in favour of defendants Nos. 2 and 4 by a deed of sale, dated 8th November 1900, for an alleged consideration of Rs 400 should not affect their reversionary rights.

The first Court dismissed the suit with costs. But the Divisional Judge on appeal reversed this finding and decreed the claim as prayed. Defendants preferred a further appeal to the Chief Court, but as the subject-matter of the suit was agricultural land assessed to land revenue, which amounted to Rs. 1-12-0 only, the plaintiff contended that no further appeal lies. Thereupon the question whether, under the circumstances of the case a further appeal lay to the Chief Court under Section 40 (1) (b) (i) of the Punjab Courts Act, 1884, as amended, was referred by the learned judges of the Division Bench to a Full Bench.

JUDGMENT OF THE FULL BENCH.

The judgment of the Full Bench, so far as is material for the purposes of this report, was delivered by:—

* * * * *

RATTIGAN, J.—(15th June 1906)—Our answer to the reference is that the rule as laid down in *Bukhu v. Jhanda*, 115 P. R., 1892 is correct, and that in accordance therewith it must be held that no further appeal lies in this case, the value of the land for jurisdictional purposes being, under the rules made under Section 3 of the Suits Valuation Act, less than Rs. 250.

REFERENCE SIDE.

No. 80.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

AMRIT LAL, AND ANOTHER,—PLAINTIFFS,

versus

BHAGWANA, AND OTHERS,—DEFENDANTS.

CASE NO. 27 OF 1906.

Punjab Tenancy Act (XVI of 1887), Section 77 (3) (n)—Jurisdiction of Civil and Revenue Courts—Suit on bond executed for arrears of rent.

A suit for recovery of money due on a bond the consideration for which is arrears of rent is cognizable by Civil Court and not by Revenue Court.

Case referred by S. Clifford, Esquire, Divisional Judge, Delhi Division, on 13th April 1906.

ORDER OF REFERENCE TO DIVISION BENCH.

RATTIGAN, J.—(21st May 1906).—Defendant executed a bond for Rs. 66-12-0 in favour of plaintiff, the consideration being arrears of rent. Plaintiff sues on the bond. Is the suit cognisable by a Civil or a Revenue Court? In my opinion, it is clearly cognizable by a Civil Court, as being a claim based upon a bond, the claim for rent having merged in the right given by the bond which was executed in satisfaction of the claim for rent. This was, I understand, the view adopted by Chatterjee J. in Civil Reference No. 95 of 1905, but as Frizelle J., has taken a different view in Civil Reference No. 55 of 1897, and as the question is one which should be authoritatively settled, I refer the case to a Division Bench.

JUDGMENT OF THE DIVISION BENCH.

JOHNSTONE, J.—(9th January 1907).—Arrears of rent of land became due to plaintiff by defendant, who thereupon executed a bond in favour of plaintiff for the amount of those arrears. Plaintiff asserts this and sues on the bond. There being a conflict of rulings by this Court in regard to the question of jurisdiction of Civil as opposed to Revenue Courts in such cases, the *Munsif* before whom the case was pending has made a reference to this Court on the point, giving his own opinion that the suit is a revenue one and falls under Section 77 (3) (n), Punjab Tenancy Act, 1887.

The conflicting rulings are that of Frizelle, J., in Civil Reference No. 55 of 1897, decided on 20th November of that year, and that of Chatterji, J., in Civil Reference No. 95 of 1905, decided on 13th Decem-

ber 1905. In the former order no reasons whatever are given, and the reasoning in the reference itself does not commend itself to us. But Chatterji, J., in the latter ruling held, on grounds which appear to us quite sound, that a suit of this kind is really a Civil suit. He said: "The suit is laid on the bond and it clearly lies in the Civil Court. The claim for rent has been discharged by the bond, and plaintiff, if he had sued for it, would have been successfully met by plea that a bond with one surety had been given in lieu of it."

We fully endorse this reasoning and we return the papers to the learned *Munsif* and direct him to hear the case.

APPELLATE SIDE.

No. 81.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

ACHHRU, AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

LABHU, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1018 OF 1906.

Custom—Pre-emption—Pre-emptor having right equal to some of the vendees and superior to others.

The plaintiffs had equal right of pre-emption with some of the vendees and superior to the others. The shares of the vendees were specified in the sale-deed.

Held, that the plaintiffs were entitled to take the whole bargain, for the sale was one and indivisible. *I. L. R., XIX All., 148, dissented from.*

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 28th May 1906.

Rai Sahib Lala Sukh Dial, Pleader, for Appellants.

Lala Dharm Das Suri, Pleader, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(12th January 1907).—This was a suit for pre-emption upon a sale of land and houses to defendants Nos. 2 to 6 by defendant No. 1. It is settled that defendants Nos. 2 and 3 had equal rights of pre-emption with plaintiffs, but that the rights of defendants Nos. 4 to 6 were inferior. The property was sold for Rs. 4,000 (figure in the deed); and it was stated in the deed that the shares of the vendees were these—

Defendant No. 2	...	...	...	$\frac{1}{8}$
Defendant No. 3	...	...	...	$\frac{1}{8}$
Defendants Nos. 4 to 6	...	...	...	$\frac{1}{8}$

The first Court found that plaintiffs could pre-empt only the last share. Fixing the real value at Rs. 3,200 it gave plaintiffs a decree for

possession of $\frac{1}{3}$ rd on payment into Court by a certain date of $\frac{1}{3}$ rd of 4,000 or Rs. 1,066-10-8.

On appeal the learned Divisional Judge came to the same general conclusion, but fixed the value at Rs. 3,381 from which sum he deducted Rupees 183 due to a mortgagee and not yet paid by the vendees. He thus arrived at the figure Rs. 3,198, and directed that the sum to be paid in by plaintiffs for $\frac{1}{3}$ rd of the property was Rs. 1,066.

Plaintiffs appeal on the main question and claim the whole bargain. There is no longer any dispute as to price to be paid.

After hearing arguments and consulting authorities we find in favour of plaintiffs-appellants. On the one side we have three Division Bench rulings of this Court, *Imam-ud-Din v. Nur Khan*; 10 P. R., 1884; *Murad v. Mine Khan*, 94 P. R., 1895, and *Kesar Singh v. Puniab Singh*, 66 P. R., 1896. In all of these the view put forward by plaintiffs is the one adopted. On the other side we have *Ram Nath v. Badri Narain*, I. L. R., XIX All., 148 (F. B) and a single judge ruling, Civil Appeal 660 of 1900, in which the previous rulings of this Court were not even noticed. After carefully considering the arguments in the Allahabad ruling we find ourselves opposed to it. In our opinion the sale is one and indivisible, and, inasmuch as defendants Nos. 2 and 3 have joined with themselves defendants Nos. 4 to 6 as vendees, the latter having no rights equal to those of plaintiffs, we think, following the above quoted Division Bench rulings of this Court, that plaintiffs are entitled to take over the whole bargain.

For these reasons we accept the appeal and give plaintiffs, in modification of the decree of the lower appellate Court, a decree for possession of the whole property in suit on payment into Court, within 2 months, of Rs. 3,198, Rs. 183 being still due to the aforesaid mortgagee. The defendants will pay plaintiff's costs throughout, if the latter pay in the money in the time. If default is made in payment by plaintiffs, the suit will stand dismissed with costs.

Appeal allowed.

APPELLATE SIDE.

No. 82.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Shah Din.

GULDAD KHAN,—(PLAINTIFF),—APPELLANT,

versus

GUL KHAN, AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 561 of 1906.

Custom—Pre-emption—Burden of proof—Wajib-ul-arz, Chakwar. Entries in—Pindigheb Tahsil, Rawalpindi District—Bhaya chara rillage—Conflict between earlier and later Wajib-ul-arzes.

Held, that under section 44 of the Punjab Land Revenue Act, there is no presumption as to correctness of the entries as to pre-emption made in the *Wajib-ul-arz, Chakwar*, of Pindigheb Tahsil of Rawalpindi District, for it is no part of the record-of-rights. That even if such a *Wajib-ul-arz* be taken to form part of a record-of-rights, the circumstance that it states custom of pre-emption as tribal, whereas pre-emption is peculiarly a local custom, deprives the entry of nearly all its presumptive value.

Held, also, that the value of a *Wajib ul-arz* favouring relatives in the matter of pre-emption which stands unsupported by actual proof of custom and is followed by a later *Wajib-ul-arz*, in which the 'law' of Act IV of 1872 is stated to contain the rule of pre-emption, is reduced to nothing, even if there are negative indications the other way.

Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 19th May 1905.

Rai Sahib Lala Sukh Dial, Pleader, for Appellant.

Mr. Muhammad Shafi, Advocate, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(2nd January 1907).—This case has been referred for disposal to a Division Bench by the Hon'ble Mr. Justice Chitty on the ground that questions of difficulty and importance arise in it; and he has put those questions in this way—(1) whether a Chakwar *Wajib-ul-arz* is a record-of-rights within the meaning of the Punjab Land Revenue Act, 1887; (2) if so, whether there is any presumption in favour of the correctness of an earlier *Wajib-ul-arz* where a new one has been substituted for it (see Section 44 of the Act).

The suit was one for pre-emption of land in the village of Nakka Dakhili Haddowali, the grounds being stated as the agnatic relationship of plaintiff to the vendor and plaintiffs being a *jaddi malik* in Nakka, whereas vendee was a *malik* by purchase and not related to vendor. The village is undoubtedly *bhaya chara*, and so to prove that relationship helps him, plaintiff must prove a special custom in this behalf. The first Court held, in effect, that no such special custom was established; and in reference to a dispute as to the real sub-divisions of the village, it held that Nakka was a single sub-division and not divided further into four sub-divisions, and so, though plaintiff was owner in the same pretended further sub-division as that in which the land in suit lies, while plaintiff was not, yet, inasmuch as both parties were owners in

Nakka, plaintiff's rights were no better than the vendee's. The decision as to custom proceeded upon the fact of the village being a *bhaya chara* one, and upon a judgment of the Divisional Judge of Rawalpindi in a previous case. The *Wajib-ul-arz* Chakwar of 1868 and the *Wajib-ul-arz* of the village of 1886 were not even mentioned, the former not having been relied upon by the plaintiff.

The learned Divisional Judge, when the case came before him on appeal, considered both the statement of rights of 1868 and that of 1886. Put briefly, the former gives a superior right of pre-emption, in the case of lands held by *Pathans* in the whole *Tahsil* of Pindigheb, to collaterals as compared with persons not related to the vendor. It is a *Kaumwar* statement for the whole *Tahsil*. The document of 1886 is the ordinary village administration paper of *Mauza* Haddowali, and the statement of custom in it is for the village and not for any particular tribe. As regards pre-emption the entry is that it follows the law (which means Act IV of 1872). The Divisional Judge also found against the plaintiff.

My own opinion is that the Chakwar *Wajib-ul-arz* is not properly speaking part of the Settlement record; that therefore no presumption of correctness attaches to it under Section 44, Punjab Land Revenue Act; that, even if it be taken to form part of the Settlement record, the circumstance that it states custom as tribal, whereas pre-emption is peculiarly a local custom, deprives the entry of nearly all its presumptive value, *Cf. Muhammad Imam Ali Khan v. Husain Khan, I. L. R., XXVI Cal., 81 P. C.,* (at page 92, last para., 3rd sentence); that though the village *Wajib-ul-arz* of 1886 does not exclude custom, yet, inasmuch as it states no custom, the party alleging a special custom must prove it; and that on a review of the evidence on the record, in the light of precedents and authorities, no special custom is established. I should note here that it has not been alleged that in the *Wajib-ul-arz* of the village of 1868 any reference whatever is made to pre-emption or to the statement of custom in the Chakwar *Wajib-ul-arz*, also that plaintiff did not in the first Court rely upon or even mention the latter document.

Section 31 (2), Land Revenue Act, lays down what a "record-of-rights" shall include. Clause (b) of the sub-section runs—"a statement of customs respecting rights and liabilities in the estate." and in the Financial Commissioner's instructions, issued with the approval of Government,—see page 95, Madan Gopal's Punjab Land Revenue Act, 2nd Edition—these words are repeated. It seems to me, then, that a document in which customs are stated for a whole *Tahsil*, tribe by tribe,

inasmuch as it does not deal with rights and liabilities in an estate, cannot be said to fall within clause (b) aforesaid. Having no *presumptive* value, then, it may have, and has, *only* such *evidential* value as a *Riwaj-i-am* has been held to have. It has been often ruled that a *Riwaj-i-am* does not *prove* customs stated in it; it *helps* to prove them, and it serves as a guide to enquiry, but actual instances of enforcement of the customs stated are necessary.

We have been referred to a number of published and unpublished rulings in connection with these questions of the value and use of the *Wajib-ul-arz* generally and the relative value of an earlier and a later *Wajib-ul-arz* of a village. I will discuss them all now, and will shew that they do not overthrow the propositions I have stated above.

Gajjan v. Bhopa and Nand Singh, 27 P. R., 1893, was a Ludhiana case. The earlier *Wajib-ul-arz* (1852) gave preference, in pre-emption, to relatives. The later one (1883) declared that pre-emption follows the law, as here; and it was found that the earlier entry had never been followed in practice, and that the only judicial decision (of 1890) had been the other way. The result was a finding that no special custom had been made out. In *Dilsukh Ram v. Nathu Singh*, 98 P. R., 1894, F. B., it was laid down that an entry in a *Wajib-ul-arz* favouring the pre-emptive rights of relatives was not an "agreement" but a statement of custom, and that, where no instances had ever occurred, the entry was not sufficient *proof* of the custom.

In *Musta v. Poklo*, 52 P. R., 1896, there were the *Wajib-ul-arz* of 1854 and that of a later settlement. In the first was a statement in favour of relatives as pre-emptors, in the second, silence. It was held that the earlier statement of custom was not cancelled by the more recent one, and that the party denying the correctness of the earlier statement must prove its incorrectness.

In *Muhammad Umar v. Kirpal Singh*, 78 P. R., 1904 it was laid down that *Dilsukh Ram v. Nathu Singh*, 98 P. R., 1894 (F. B.) must not be taken as holding that, where a later *Wajib-ul-arz* is inconsistent with an earlier one, the earlier one still remains in force. This is undoubtedly sound; but I doubt whether the additional *dictum* is correct, that there is any necessary inconsistency between a statement in favour of the pre-emptive rights of the relatives and a statement that pre-emption follows Act IV of 1872. The next ruling, *Jawahir v. Radha*, 35 P. R., 1905, ⁽¹⁾ seems to lay it down that there is no such

(1) s. c., 15 P. L. R., 1905.

inconsistency and that the earlier of two such statements of custom has a certain presumption of correctness attaching to it. In *Ali Muhammad v. Piran Ditta*, 70 P. R., 1905, ⁽¹⁾ also entries in effect similar to these were held not mutually contradictory.

All these cases are concerned with two genuine successive *Wajib-ul-arzes*. In the present case in my opinion the earlier statement of custom is not on the same footing as a village *Wajib-ul-arz*, and so is not part of the "record of-rights", but I have discussed these cases because I wish to explain that even if the Chakwar *Wajib-ul-arz* has attaching to it the presumption afforded by Section 44, Land Revenue Act that presumption is extremely weak, and is virtually rebutted by the facts of the case.

And here I should mention the following unpublished judgments of this Court dealing with similar questions, viz., *Ruldu v. Sharaf Ali and Saudagar* (Civil Appeal 991 of 1896), *Umar Din and others v. Sohna and others* (Civil Appeal 1015 of 1905), *Bahadar Singh v. Bhola and others* (Civil Appeal 743 of 1899); *Wazir Bakhsh v. Karm Dad and others* (Civil Appeal 89 of 1900).

The first of these comes from Hissar. In the *Wajib-ul-arz* of 1864 pre-emption on mortgages was affirmed, in the later *Wajib-ul-arz*, silence. It was held that, though the old *Wajib-ul-arz* cannot be said to be of no value, it was before Act IV of 1872, and the facts of absence of instances under it and of silence of new *Wajib-ul-arz* shewed that the alleged custom had no existence.

In *Umar Din's* case (Lahore) the *Wajib-ul-arz* of 1856 was in favour of relatives, and the later settlement records of custom were silent on the point. It was held that the alleged custom was not proved. Up to 1856 there had been no sales at all. *Bahadur Singh's* case (Lahore) was similar, except that several sales had taken place since 1856 without reference to the rule laid down in that year.

In *Wazir Bakhsh v. Karam Dad* the Court, upon circumstances similar to those of *Gajjan v. Bhopa*, 27 P. R., 1893 quoted above, found in the same sense.

I think all these cases shew that the value even of a genuine *Wajib-ul-arz* favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom followed by a later *Wajib-ul-arz* in which the "law" of Act IV of 1872 is stated to contain the rule of pre-emption, is so small as to be virtually *nil*.

(1) s. c., 93 P. L. R., 1906.

Technically the value is not *nil*, for *see Masta v. Pohlo*, 52 P. R., 1896 and *Jowahir v. Radha*, 35 P. R., 1905, but even negative indications the other way are sufficient to reduce its value to nothing.

Now let us turn to the cases in which the value of a *Wajib-ul-arz* Chakwar is directly or indirectly dealt with: *Karam Shah v. Tara Shah*, 87 P R., 1905,⁽²⁾ which is really a Division Bench case and not, as printed, Single Judge case comes from the Fateh Jang *Tahsil* of the Rawalpindi District. The judgment is a brief one. It finds in favour of the party relying on the Chakwar *Wajib-ul-arz*; but it does so (partly at least) on the ground that there are three instances in support of it. It nowhere says that the Chakwar *Wajib-ul-arz* is part of the record of-rights, or has any *presumption* attaching to it. The view of the learned judges as to its value appears to be that it has some evidential value, but, even so, much less value than an ordinary village *Wajib-ul-arz*.

Next comes *Nawab Khan v. Muhammed Khan and others* (Civil Appeal 127 of 1899) from Pindi Gheb *Tahsil*, as in present case. Indirectly the old *Wajib-ul-arz* Chakwar seems to have been treated as on the same footing as the new village *Wajib-ul-arz*, for it is said that the new entry of custom does not cancel the old; but it is held that the alleged custom must be proved by instances, and it was held so proved by one case in which the *same vendee* admitted the custom.

In Civil Appeal 1330 of 1905 and 1171 of 1905 (one case) the same *Wajib-ul-arz* Chakwar was held not cancelled by later village *Wajib-ul-arz*, and on the evidence in the case it was found that the custom as stated in the former prevailed.

It seems to me fair to say that in none of these cases was it found, after direct discussion of the point, that the Chakwar document formed part of the record-of-rights with the presumption of correctness stated in Section 44, Land Revenue Act, attaching to it. The most that was found was that the entry had certain evidential value; and I have no hesitation in saying that that value is so small that no decree should be based on it.

Mr. Sukh Dial, in his argument for the plaintiff, has not pretended that there is on the record any actual proof of custom in favour of relatives in *Mauza Haddowain*. The learned Divisional Judge has given two contrary precedents. It is needless to say more. I would dismiss this appeal with costs.

Appeal dismissed.

(1) 1 C., P. L. R., 1905.

(2) S. C., 48 P. L. R., 1906.

APPELLATE SIDE.

No. 83.

CIVIL.

*Before Mr. Justice Johnstone and Mr. Justice Rattigan.**Mussammatt JAMNA DEVI,—(DEFENDANT),—APPELLANT,**versus**MUL RAJ,—(PLAINTIFF),—RESPONDENT.*

CASE No. 875 OF 1906.

Hindu Law—Marriage not dissolved by apostacy of one of the parties.

Held, that apostacy of one of the parties to a marriage in the case of Hindus, does not *per se* annul the marriage, and a Hindu husband's suit for restitution of conjugal rights cannot be defeated by the fact of the wife's conversion to Islam after her marriage with the plaintiff.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 1st May 1906.

Mr. Fazal-i-Husain, Advocate, for Appellant.

Mr. B. R. Sawhney, Advocate, for Respondent.

JUDGMENT.

JOHNSTONE, J.—(9th January 1907).—In this case, Mul Raj, plaintiff, an Arora by tribe and Hindu by religion, has brought a suit against defendant No. 1, his wife, and defendant No. 2, a Muhammadan, for custody of the former. Defendant No. 2 denies that the lady is with him; and defendant No. 1, while admitting her marriage to plaintiff, states that she has embraced Islam, that it is impossible for her, as a sincere Muhammadan, to live with plaintiff as a wife should live with a husband, and that she has been cruelly treated, and so asks that the suit be dismissed.

The first Court absolved defendant No. 2 from all liability, and went on to hold that plaintiff had not been guilty of any cruelty towards the lady such as would debar him from claiming her company. Then the Court discussed the question whether the fact of her turning Muhammadan is a bar to a suit like this, and in the end found against the plaintiff. On the strength of the ruling *Mussammatt Jowali v. Karm Singh*, 47 P. R., 1892, the Court ruled that the granting of such a decree as that prayed for is discretionary with the Court, that the woman is now a genuine Muhammadan, that the husband will stick at nothing to reconvert her, and may even murder her, that as a Muhammadan she cannot live with a Hindu husband, and that for these reasons the relief asked for must be refused.

The learned Divisional Judge, when the husband appealed to him, took a different view. He thought that the first Court's fears for the lady's safety were merely imaginary; that she was undoubtedly the wife of the plaintiff and had never been ill-treated, and so must return to him. The suit having been decreed, the lady has filed a further appeal, and we have heard an elaborate argument on both sides of the case.

The conclusion at which I have arrived is that the decree for custody must stand. My reasons are briefly these, that the marriage is admitted and is indissoluble, that, though the granting of decree is discretionary, that discretion must be exercised with due regard to the law and to equity and good conscience; that marriage and the rights and duties arising out of it being the very basis of the social fabric, only very cogent reasons can justify any tempering with the institution or ignoring of those rights and duties; that it is against justice to allow a Hindu woman simply by changing her religion to deprive her husband of the rights he acquired at marriage; that in the present case plaintiff has done nothing which would warrant this Court in refusing him those rights; that conjectures regarding how he may possibly treat her if he gets her back are not an appropriate basis for a decision of such a suit as this, that though no doubt the situation is an unpleasant one for defendant No. 1, as a sincere believer in Islam, the Court should not take this aspect of the case into account, inasmuch as the balance of justice is decidedly in favour of the husband, who has adhered to the faith he held at time of marriage, who has done no wrong, and who simply asks for his natural and legal rights, rather than in favour of the wife, who has, by an act of her own, done against his wishes, created the difficulty and now desires to rob him of those rights. I may also say that in my opinion to decide in favour of the lady on facts such as we have in the present case would render the Hindu wife virtually independent of her husband whenever he and she had a difference of any kind, she could say she was a Muhammadan and so could emancipate herself from his control. Such a state of affairs would lead to countless troubles.

In one part of his argument the learned counsel for the plaintiff dealt with the case from the point of view of the strict ancient Hindu Law; but I do not intend to follow him. It is enough for me that by Hindu Law a marriage is indissoluble. The *Government of Bombay v. Ganga*, I. L. R., IV Bombay, 330, and *In the matter of Ram Kumari*, I. L. R., XVIII Cal. 264, the counsel for the lady admits

this ; that marriage in all civilised systems of law implies the creation of rights and duties in the husband and rights and duties in the wife ; that in Hindu Law, as in all laws, the right of the husband is that his wife must live with him as a wife, if he so wishes, and if he has not lost this right through some cause, immanent in him or proceeding from him, calculated to render the enforcement of the right opposed to the principles of justice, equity and good conscience.

Mr. Fazal-i-Husain, for defendant No. 1, began by arguing that this was a case of conflict of laws, the man following Hindu Law and the woman Muhammadan Law, and that the law of the defendant should prevail (*Mahomed Sidick v. Haji Ahmed*, I. L. R., X Bom., 1, second para of head note). I am inclined to agree with Mr. Sawhney, for plaintiff, that the case is not properly speaking one of conflict of laws ; and even if it is, it seems to me in keeping with justice to hold, on the facts of the present case, that law should so far as possible be applied which the parties were governed by at the time of the marriage. If Muhammadan Law is applied the marriage is dissolved by the mere fact that the woman is a Mussalman and the man a Hindu ; this is not denied. But it must be taken that at time of marriage the woman, marrying as a Hindu, knew and intended, as her husband did also, that the marriage could in no way whatever be dissolved. I do not think that the English Statutes, 21 Geo. III Chap. 70, Section 17 ; 4 Geo. IV Chap. 71, Sections 7, 17, quoted at pages 5 and 6 of West and Buhler's Digest of Hindu Law, 3rd Edition, Volume I, and relied upon by Mr. Fazal-i-Hussain, have really any bearing on such a case as the present. It follows, then, that the Hindu Law should not be thrown over in this case. It cannot be directly applied, for it does not explicitly provide for such cases as the present, so far as I know, and thus we must fall back upon the well-known Section 5, Punjab Laws Act, 1872, and the rule of justice, equity and good conscience. That rule cannot be said to be followed in a case like this if we throw over the Hindu Law under which the parties were married, and to all the rights under which plaintiff is still entitled.

Reading to us the *dicta* and opinions to be found in Tagore's Law Lectures, 1870, P. 3, last para., Siromani's Hindu Law, pp. 39, 40, Banerjee's Hindu Law of Marriage and Stridhan, Edition, 1896, p. 19, etc., etc., Mr. Fazal-i-Hussain argued that, when a Hindu abjures his faith, he is outside the pale of Hindu Law, which no longer governs him ; and from this he deduced the contention that his client's abjuring of the Hindu religion puts her outside that pale, and so she cannot be

subject to that law. This reasoning appears to me unsound. She may be outside the pale of Hindu Law in the sense that she could not enforce rights accruing to her, or rather which she formerly had, under that law ; but she cannot get rid of her already existing liabilities, and she cannot be permitted to destroy her husband's already acquired rights in this way.

Mr. Fazal-i-Hussain then quoting, as an indirect authority, *Sinam Mal v. The Administrator-General of Madras, I. L. R., VIII Mad., 169* and Banerjee's book mentioned above, pages 122, 123, suggested, that, because an apostate from Hinduism cannot enforce conjugal rights against the husband (or wife) who remains a Hindu, the converse proposition also holds good. (see also Ghose's Principles of Hindu Law, 2nd Edition, p. 694, line 2.) There is no authority for this, and for the reasons already given I reject the suggestion.

Next Mr. Fazal-i-Husain presses the point that, as matters stand, his client cannot perform wifely duties towards plaintiff who is an orthodox Hindu. He cannot eat food cooked by her or let her touch his food or drink ; he cannot let her join him in any religious ceremony or act of worship, and so forth, (See Ghose's Principles of Hindu Law, p. 664, opening sentences). From this he argues that a decree for custody could be of no real use to plaintiff, except perhaps to give him an opportunity of forcing her to renounce her new faith ; and he contends that to give a decree in this case is thus tantamount to laying it down that a Hindu woman has no right to freedom of conscience, and can never renounce Hinduism, whatever her real sentiments may be. I am not sure that we, sitting as a Court of Justice, need formally refute such an argument as this. It is sufficient for me to say that, if plaintiff is really an orthodox and conscientious Hindu, he will, until, if ever, his wife returns to the fold, simply keep her in some part of his house and try to persuade her to abjure her new faith, or if he is not orthodox, he will try to persuade her to perform the functions of a wife, and will risk excommunication from his communion. In neither case would she, in law, have any grievance ; but if he ill-treats her, the Courts are open and she might have a cause of action for a separation. At present I can see no reason in all this for refusing him the decree he has asked for and has obtained. The above reasoning, in my opinion, disposes of all the arguments based on such statements of law, as are to be found in Siromani's book, p. 99, para, 14, Narasimiah, pp. 13 and 27, and Bannerji, pp. 186—189,

Some stress was laid by Mr. Fazal-i-Husain upon the *dictum* in *Imam Din v. Hasan Bibi*, 85 P. R., 1906, ⁽¹⁾ to the effect that the conversion of a Muhammadan woman to Christianity operates to dissolve absolutely her marriage to her Muhammadan husband ; but I am unable to see how this helps his client, the Hindu Law being so entirely opposed to the Muhammadan in this matter.

Only two more points call for remark. First, is there any reasonable ground to apprehend that defendant will be cruelly treated if she returns to her husband ? After carefully considering the evidence on the record I find myself unable to hold that there is any such ground. Past cruelty is not proved ; and as regards the future plaintiff merely says he will try to reconvert her. I cannot assume that this will involve cruelty, if it does the Courts are open.

Secondly, it is suggested that the decree should be saddled with conditions. It is not explained precisely what conditions are claimed, and I do not see how the Court can frame any conditions which it could enforce. In my opinion we cannot rightly insert in the decree, for instance, that plaintiff must refrain from his marital privileges and must keep the lady as he would keep a sister ; or that he must not ask her to cook his food, if he should wish her to do so ; or that he must not attempt to get her back to Hinduism. He must, of course, refrain from cruelty ; but that is understood in every decree for custody or restitution of conjugal rights.

I have not discussed the views laid before us by Mr. Sawhney except indirectly, inasmuch as in my opinion the above exposition adequately disposes of the case.

I would dismiss the appeal with costs.

RATTIGAN, J.—I entirely agree, and have but little to add to my learned brother's judgment. There are, however, a few observations which I would like to make as the subject is one of considerable importance. I am unable to accept the argument that the marriage tie between the parties was *ipso facto* dissolved when the appellant renounced Hinduism. No doubt, from the Hindu point of view, she thereby suffered degradation : it may even be that a strictly orthodox Hindu could not, consistently with his religious scruples, thereafter consort with her. But, as remarked, in the case of *Administrator-General of Madras v. Anandachari*, 1. L. R., IX Mad., 466, according to Hindu Law, the degradation can be atoned for, and the convert re-admitted to her status as a

(1) s. c., 148 P. L. R., 1906.

Hindu, if she hereafter renounces Islamism and performs the rights of expiation of her caste. But, however this may be, the great weight of authority is clear that apostacy of one of the parties does not in the case of Hindus *per se* annul the marriage, (see the case above cited and *The Government of Bombay v. Ganga*, I. L. R., IV Bom., 330, *Bisheshur v. Mata Ghilam*, 2 N. W. P. 300, *in re Millard*, I. L. R., X Mad., 218, In the matter of *Ram Kumari*, I. L. R., XVIII Cal., 264, *Sundari Letani v. Pitambari Letani*, I L. R., XXXII Cal., 871, *The Crown v. Mussammat Gholam Fatima*, 32 P. R., 1870 (Cr.). In support of the opposite view Mr. Fazal-i-Husain relied upon *Rahmed v. Mussammat Raheya Bibi*, 1 Norton's Leading Cas. 12 and *Sinammal v. Administrator-General of Madras*, I. L. R., VIII Mad., 169, but as pointed out by the learned author of "Hindu Law of Marriage and Stridhan," Doctor Gooroo Das Banerjee, these authorities are opposed to the cases above referred to, and cannot be accepted as correctly stating the law on this point. I might add that the learned author was himself one of the judges who decided the case of *in re Ram Kumari*.

I am also unable to accede to the proposition that, in a case of this kind, the question at issue should be decided in accordance with the law which governs the defendant. The parties were originally both Hindus, and their marriage was solemnised in accordance with the Hindu Law. The husband, the present plaintiff, is still a Hindu. Surely, under such circumstances it would be repugnant to equity and good conscience to hold that the rights which accrued to him under that law at the time of his marriage must be deemed to have been lost because his wife has subsequently renounced the Hindu religion and adopted a faith which forbids her from co-habiting with a Hindu husband? The case of *in re Millard*, above cited, is a direct authority for holding that under such circumstances the rights of the husband cannot be regulated by the Muhammadan Law. And in this connection I would also refer to the remarks of Dr. Banerjee at page 28 of the work to which I have already made reference. He says: "The importance of the institution of marriage is too well recognised to require any comment. It is the source of every comfort from infancy to old age; it is necessary for the preservation and well-being of our species; it awakens and develops the best feelings of our nature; it is the source of important legal rights and obligations, and, in its higher forms it has been tended to raise the weaker half of the human race from a state of humiliating servitude. To the Hindu, the importance of marriage is heightened

“ by the sanctions of religion. By no people, says Sir J. Strange, is “ greater importance attached to marriage than by the Hindus. In “ Hindu Law it is regarded as of the ten *sanskars* or sacraments, necessary for regeneration of men of the twice-born classes and the only “ sacrament for women and *sudras*. ”

Mr. Fazal-i-Husain in his able argument laid great stress on the hardship that would ensue if the appellant were compelled, against her conscience, to return to co habitation with her Hindu husband. I admit the hardship and I fully realize the unfortunate position in which the appellant is placed. But I cannot on this account refuse to grant the respondent the relief to which he is by law entitled. He has himself done nothing to forfeit those rights. He would be entitled, if he so wished, to “ desert ” his wife by reason of her apostacy and, under the personal law which must be taken to govern the case, he need do no more than allow her what is called a “ starving maintenance. ”

But if he prefers to enforce his marital rights, the Courts must, I conceive, give their assistance. The position would be very different if the person who asked for relief of the kind now prayed for, happened to be the apostate spouse. In that case there is ample authority for holding that a decree for restitution of conjugal rights should be refused (*see Banerjee's Hindu Law of 'Marriage and Stridhan,' at pages 122, 123*). But in the present case it is the non apostate spouse who is asking for relief, and I know of no authority which would justify us in refusing him the decree to which he is by law entitled in the absence of any fact disentitling him thereto.

For these reasons, and for the reasons given by my brother, I agree that the appeal should be dismissed, and the order of this Court is accordingly that the appeal is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 84.

REVENUE.

Before The Hon'ble Mr. J. M. Douie, Financial Commissioner, Punjab.

MUHAMMAD MURAD,—APPELLANT,

versus

SARDAR BAKHSH,—RESPONDENT.

CASE No. 41 OF 1906-07.

Punjab Land Revenue Act (XVII of 1887), Section 28, Rules under —Rule No. 166 —Zaildar. Appointment of—Discretion of Commissioner —Interference by Financial Commissioner.

In deciding an appeal in a *Zaildari* case the duty of the Financial Commissioner is that the decision made by the Commissioner should be upheld unless the man he has chosen is either unfit, or for some good reason ineligible, or is manifestly very inferior to his rival.

Appeal from the order of H. J. Maynard, Esquire, Officiating Commissioner, Multan, dated 8th January 1907, reversing the order of H. A. Sam, Esquire, Collector, Jhang, dated 14th September 1906.

ORDER.

THE FINANCIAL COMMISSIONER.—(1st August 1907).—If I had been deciding this case as Deputy Commissioner I should very probably have appointed Muhammad Murad in consideration of the length of his father's services as *Zaildar* and his own services at one time as *Sarbarah*. Also great weight must be given to the opinion of an officer like Mr. Abbott who served 9 years in Jhang as Deputy Commissioner and Settlement Officer, and knew the people of Jhang District as no English officer has known them for 30 years. But the Commissioner on appeal has preferred Sardar Bakhsh, and it is impossible to say that he is not fit, and as regards property, and perhaps influence in the *Zail*, he is superior. Mr. Abbott, in a note dated 18th April 1906, mentions him as a prominent man in the *Zail*, and there seems in fact to be nothing against his character. My view of the duty of the Financial Commissioner in deciding an appeal in a *Zaildari* case is that the decision made by the Commissioner should be upheld unless the man he has chosen is either unfit, or for some good reason ineligible, or is manifestly very inferior to his rival. I decline to interfere. Parties will pay their own own costs in this office.

Appeal rejected.

REVISION SIDE.

No. 85

CIVIL.

Before Mr. Justice Kensington.

GIRDHARI DAS, AND OTHERS,—(PLAINTIFFS),—PETITIONERS,
versus

GOBIND, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 315 OF 1903.

*Civil Procedure Code (Act XIV of 1882), Sections 11, 57, 588 (6)—
Dekkan Agriculturists' Relief Act XVII of 1879, as amended—
"Agriculturist"—Trader owning land.*

Held, that traders who invest their profits in land and then go bankrupt are not entitled as agriculturists to the protection of the Dekkan Agriculturists' Relief Act,

Petition for revision of the order of A. E. Martineau, Esquire, Additional Divisional Judge, Multan Division, dated the 25th November 1902.

Bhagat Ishwar Das, Pleader, for Petitioners.

Mr. Lachmi Narain, Pleader, for Respondents.

JUDGMENT.

KENSINGTON, J.—(7th December 1907).—This is an application for revision of an order under Section 57, Civil Procedure Code, returning a plaint for presentation in the Court of Shikarpur. The Divisional Judge has dismissed the appeal to him under Section 588 (6) of the Code, and his order is final. It can only be interfered with on revision if it is sufficiently established that the lower Courts are wrong in declining jurisdiction.

The question turns on the provisions of the Dekkan Agriculturists' Relief Act XVII of 1879, as amended in various years, the last amendment so far as is known having been by Act VI of 1895. It is made impossible for me to be certain that the complete Act is before me, but I have the Act as it stood in 1894 (Volume 1 of the Bombay Code, 1894 Edition) and also the amending Act VI of 1895. There is no information available as to what notifications may have been issued under the Act by the Local Government extending its provisions to Sind, but the Local Government clearly had the power to so extend it, and from no less than three decisions of the Courts of Karachee and Shikarpur, of which copies are exhibited by the respondents' counsel, it appears not only that the Act has been so extended, but also that it has been applied to these very defendants in the same way as has been done here by the lower Courts.

I cannot say that either the application of the Act or the correctness of the decision that the defendants come within the definition of agriculturists given therein have been established beyond doubt, though it is certainly material to find certain Courts in Sind coming to the same conclusion as the Multan Courts on both these points.

On the other hand the plaintiffs' pleader has produced a copy of a decision by Mr. F. C. O. Beaman, Judge of the Sadar Court of Karachee, dated 25th October 1906, in a very similar case—*Firumal* versus *Pahlumal* (Miscellaneous Appeal No. 10 of 1903) which goes very far the other way. It was there held that traders who invest their profits in land and then go bankrupt are not entitled to the protection of the Act as agriculturists. This is precisely what the

defendants in the present case are understood to have done, and the arguments of the learned Judge of the Sadar Court, against treatment of such persons as agriculturists as defined in Section 1 of the Act, are to my mind far more convincing than the bare findings to the contrary of inferior Courts in Sind mentioned above.

Taking the definition as it stands, with the description of the defendants given by the lower Courts, I do not consider that they have been correctly treated as agriculturists within the meaning of the Act, merely because shortly before institution of the suit they failed in their regular business as grain speculators, and had to fall back on their income from land acquired when their business was profitable. It follows that even if the Act be applicable to Sind, the defendants cannot avail themselves of its protection. Not being agriculturists they do not come within the Act at all.

I recognise the inconvenience of a decision which appears to be at variance with those given by certain Courts in Sind, but it is not certain that the decisions in question have been upheld. In any case the then plaintiffs, being themselves residents of Sind, may not have cared very much where they were required to sue. The matter is altered where the plaintiffs are residents of Multan, who naturally object strongly to being told to sue in Shikarpur.

My conclusion is that the lower Courts have wrongly declined jurisdiction. I allow the revision, and set aside the orders returning the plaint, which should be again presented in the Multan Court. Costs up to date to be costs in the cause.

Petition accepted.

REVISION SIDE.

No. 86.

CRIMINAL.

Before Mr. Justice Robertson.

SHIV NATH,—(ACCUSED),—PETITIONER,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 1202 OF 1907.

Revision—Criminal cases—Executive order—Criminal Procedure Code (Act V of 1898), Sections 202, 204, 439—Enquiry by Police by order of District Magistrate when case is being tried by a Subordinate Magistrate.

In a case under section 49 of the Excise Act, process was issued under section 204 of the Criminal Procedure Code, and later on proceedings were taken under

section 242 and section 244 of the Code. The District Magistrate issued order to the Police to continue enquiry into the case. On revision it was contended on behalf of the District Magistrate that his order was not open to revision as he acted as head of the Excise Administration in the district.

Held, that the action of the District Magistrate was illegal and the Chief Court was competent to order enquiry to be dropped.

When an illegal order is passed and action taken, which involves matters coming within the purview of law and justice and within the scope of the authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as judicial officer, more particularly when no authority other than as a judicial officer for his action is cited.

Petition under section 439 of the Criminal Procedure Code, for revision of the order of D. J. Boyd, Esquire, District Magistrate, Multan, dated the 28th August 1907, rejecting application.

Mr. Fazul Husain, Advocate, for Petitioner.

JUDGMENT.

ROBERTSON, J.—(14th November 1907).—The facts in this matter are as follows :—A complaint was filed against one Shiv Nath under section 49 of the Excise Act XII of 1896, by the Public Prosecutor of Multan, on behalf of the Collector of the District in the Court of Muhammad Hayat Khan, Magistrate, 1st Class. No action was taken by the Magistrate, under Section 202, Criminal Procedure Code, but process was issued under Section 204, Criminal Procedure Code, and later on proceedings were taken under Section 242 and Section 244 of the Criminal Procedure Code. Notwithstanding that the Magistrate, Muhammad Hayat Khan, was full “seised” of the case, the District Magistrate issued orders to the Police to continue enquiry into the case. Enquiry was made from the District Magistrate as to what law he had acted under in ordering this enquiry by the Police to proceed, and the District Magistrate replied that it was issued under no known law, but by him as Head of the Excise Administration and Collector of the District, and he asked that if further proceedings were to be taken he might be represented, and he adds: “I may point out that my order passed as “Collector and Head of the Excise Administration of my district. In “these circumstances I do not understand how it can be revised by “a Judicial Tribunal.”

A somewhat similar reply was made years ago when a District Magistrate was called in question for ordering an illegal whipping

by this Court. The reply being that no judicial tribunal could interfere as the action had been taken on the revenue side.

The Collector is not now represented before this Court although notified of the date on 9th October last.

It would seem hardly necessary to point out the fallacy of the District Magistrate's reasoning. When an illegal order is passed and action taken, which involves matters coming within the purview of law and justice and within the scope of the authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer, more particularly when no authority other than as a judicial officer for his action is cited. The argument put forward that a private person who has filed a complaint may continue his enquiries after the case has commenced, and therefore a Collector may use the Police to continue his enquiries is also obviously fallacious. The Collector can of course continue his enquiries, but he cannot as District Magistrate order the Police to use their very special powers under the authority of a Magistrate except when the law so empowers him to do. So far as I know the law does not give the Head of the Excise Administration any power to call in the Police to use powers which they can only use under the law which applies to them. It is quite clear that the District Magistrate, in whatever capacity he may designate himself, was not competent to order the enquiry to be made, which is complained of in this case, after a competent Magistrate was seised of the case, and it is equally clear that this Court has the power to prevent such a breach of the law. It would appear that the District Magistrate in question has abandoned the position taken up by him from his not being represented, but the action having been taken and the position taken up, it is desirable to point out how clear it is that it is untenable. The enquiry has been dropped, and must not be resumed save as may be in accordance with law.

Petition allowed.

REVISION SIDE.

No. 87.

CIVIL.

Before Mr. Justice Johnstone.

BHAGWAN SINGH, AND OTHERS,—(DEFENDANTS),—PETITIONERS,

versus

MOHAN LAL,—(PLAINTIFF),—RESPONDENT.

CASE No. 1672 OF 1907.

Limitation Act (XV of 1877), Schedule II, Article 179 (2)—Limitation—Execution of decree—Withdrawal of appeal.

When an appeal is withdrawn the appellant cannot claim to count the period of three years allowed for execution of the decree originally passed in his favour by the lower Court from the date of his withdrawing the appeal. He has only three years from the date on which the original Court passed the decree.

Petition for revision of the order of the District Judge, Jhang, dated 12th February 1907.

Rai Sahib Lala Sukh Dial, Advocate, for Appellants.

Mr. Shelverton, Advocate, and Pandit Jowala Pershad, Pleader, for Respondent.

ORDER.

JOHNSTONE, J.—(4th January 1908).—This case and Civil Revision No. 1696 of 1907 are connected cases. In the latter, first application was made on 14th February 1907 for execution of a decree, dated 8th February 1904, and the question arose whether the application was barred by time or not. The first Court held that, inasmuch as in the rent case (C. R. No. 1672 of 1907) a *jawab dawa*, dated 20th November 1905, had been put in binding on all the defendants (same as in the decree case), in which the right of plaintiff to half the house had been admitted, therefore the *jawab dawa* amounted to an acknowledgment under Section 19, Limitation Act, and so the decree was not dead. This was appealed to the District Judge who refused to consider the point of limitation as it had not, he said, been raised by the judgment-debtors in the first Court. The judgment-debtors now petition here on the revision side.

There can be no doubt that the District Judge was not right in refusing to consider and determine the point of limitation raised, and Mr. Sukh Dyal contends that the case should be remanded to his Court. Mr. Shelverton, on the other side, points out that, apart from

Section 19 aforesaid, the application for execution of decree was within time, because an appeal against the decree was not withdrawn until 28th July 1904, and thus, under *I. L. R.*, XXX *Mad.*, 1 (F.B.), the three years' period did not expire till 28th July 1907. It is admitted that the Bombay High Court has held the other way, and that no published ruling of the Punjab Chief Court is to be found bearing on the point. In these circumstances I think the best thing for this Court to do is to hear regular arguments, for which Mr. Sukh Dial is not prepared on the question whether the aforesaid application for execution of decree was barred by time or not. This will cause a smaller waste of time than a remand would.

As regards the present case (C. R. No. 1672 of 1907) Mr. Sukh Dial has raised two questions. Mr. Shelverton contends that neither is one for consideration under Section 70 (1) (a) Courts Act, but I do not agree with him. I think the lower Appellate Court has omitted to consider fully the question whether, after the purchase of the house by plaintiff, the mortgage still subsisted at all, and wholly omitted to consider whether, the decree being dead, if it is dead, any claim to rent could be enforced. I have considered both points, and on the first I am against the petitioners. Plaintiff's purchase from Bura purported to be of the whole house, and naturally the whole mortgage-money (Rs. 150), which was a burden on the whole house, formed part of the sale-price. But *Lala Topan Ram* having later on decided that the seller, Bura, only owned half, and so could not sell the whole to plaintiff, I think it is reasonable to hold that plaintiff, who in reality became owner by purchase only of half, cannot be supposed to have intended that the security as regards the other half should not be kept alive.

On the second point I can offer no opinion until the question, whether the decree is or is not dead, has been decided. I am obliged therefore to keep this pending. I may also note that I overrule the objection that only three years' rent should have been awarded. See also Civil Revision No. 1696 of 1907.

JUDGMENT.

JOHNSTONE, J. (25th February 1908).—My order of 4th January 1908 should be read along with this judgment. The question substantially is whether the decree of 8th February 1904, giving the decree-holder half of certain property, is dead or not. The first application for execution

bears date 8th February 1907, and so if the application had been duly presented on that day, no doubt it would have saved the decree. But the facts, even as stated by the decree-holder, make it clear that it was not so presented. It is said that it was brought to the Court after office hours, and after the Court had risen and was refused, to be actually presented not until 14th February. I have no hesitation in saying that the alleged presentation on 8th February 1907, if it ever really occurred, was no presentation at all.

But two other matters are put forward by way of bringing the said application within time. The first is that an appeal was filed against the decree of 8th February 1904, which appeal was withdrawn on 28th July 1904. It is said that under Article 179 (2), Schedule II, Limitation Act, 1877, the order upon the application for withdrawal was an order within the meaning of that clause of the Article, and so the period of three years counts from 28th July 1904, *I. L. R.*, XXX *Mad.*, 1 (F.B.) supports this view. But I much prefer the view taken in *I. L. R.*, XXI *Bom.*, 500 (at page 506); XV *Bom.*, 370 (at page 375; *I Mad. L.J.*, 746; *I. L. R.*, XV *Mad.*, 170 (at page 173); IV *Mad.*, 43 (at page 46); *I All.*, 293 (at page 295).

No Punjab ruling on the point has been found, but the matter seems to me so clear that I refrain from referring it to a Division or Full Bench. The Full Bench of Madras gave no reasons and discussed the point in a very summary and unilluminating way. There too an appeal had been filed and withdrawn; but in the final judgment this incident of *withdrawal* was not emphasized, the *dictum* being that time counts from the last order of the Appellate Court disposing of the appeal. This seems to me, speaking with all respect, a begging of the question. The question is whether upon a withdrawal of an appeal the Appellate Court passes any "order" disposing of the appeal.

The way I look at the matter is this. The reason why Article 179 (2) was enacted was because, when an Appellate Court passes a decree different from that of the first Court, or confirms the decree of that Court by way of adjudication the decree to be executed is not the decree of the first Court but of the Appellate Court; and naturally the period of three years should be counted from date of decree to be executed. Similarly, if the order of the First Court is not a decree but an "order" merely, then if the Appellate Court adjudicates upon that

"order" and confirms or alters it, the order to be executed is the order of the Appellate Court; and the same result follows.

But *I. L. R.*, *XV Bom.*, 370, the order upon withdrawal of appeal against a decree is not a "decree," and it is not such an order as is contemplated by Article 179 (2). The filing of the appeal does not prevent execution of the decree—page 375 of the same ruling—and it is illogical to hold that *in connection with the execution of the decree of the first Court* in the present case, which decree is the only one that ever came into existence, limitation should run from any date but the date of that decree.

I. L. R., *XXII Bom.*, 500 (at page 506) is authority for the proposition if authority is needed, that, when an appeal has been withdrawn, the decree to be executed is the original decree. In the present case the Appellate Court did not pretend to adjudicate on the appeal. That Court merely recited the withdrawal and stated as the result that "the decree of the lower Court stands" merely a statement of fact and not an order of confirmation, which indeed would have been out of place. I therefore hold that the time did not run from 28th July 1904.

The other matter urged is that Section 19, Limitation Act, 1877, saves the decree, by reason of a *jawab dawa* of 20th November 1905 of the judgment-debtors admitting the decree. But there are two flaws in this. There are three judgment-debtors, and the *jawab dawa* was only the *jawab dawa* of two of them, Thakur Singh and Sant Singh, and was actually signed only by Thakur Singh. The third man, Bhagwan Singh, not only is not named but had not at that time been served with summons in the case. The added suggestion that Thakur Singh was duly authorized agent for the other two will not hold water, seeing that, though he may have been agent for Sant Singh, there is nothing to show that he was so for Bhagwan Singh, who at the time had not even heard of the suit and so could hardly have "authorized" Thakur Singh, to make acknowledgments or do any other act on his behalf.

I hold then that the District Judge was wrong in refusing to consider the point of limitation, and that the first Court decided the point wrongly.

The suit is one for rent of this very property, and I find that the plaintiff's right to the property has been lost through the extinction of the decree.

The suit should therefore have been dismissed. I allow the revision and dismiss the suit with costs throughout.

Petition allowed.

FULL BENCH.

APPELLATE SIDE.

No. 88.

CIVIL.

*Before Sir William Clark, Kt. Chief Judge, Mr. Justice Robertson and
Mr. Justice Shah Din.*

FAQIR ALI SHAH—(DEFENDANT),—APPELLANT,

versus

RAM KISHAN AND OTHERS—(PLAINTIFFS),—RESPONDENTS.

CASE No. 548 OF 1906.

Cause of action—Pre-emption—Devolution by inheritance.

The right to sue for pre-emption upon a cause of action which has accrued to a person in his lifetime passes at his death to his successors on their inheriting his land which gave him the right to pre-empt.

*Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge,
Multan Division, dated 11th April 1906.*

Messrs. Grey and Roshan Lal, Advocates, for Appellant.

Messrs. Oertel and Harris, Advocates, for Respondents.

ORDER OF REFERENCE TO A FULL BENCH.

SHAH DIN, J.—(24th May, 1907).—The facts of the case, so far as they are material for purposes of this reference, are as follows :—

On 29th March 1899, Miran Bakhsh, defendant No. 3, purchased the well in suit known as the Shahwala well, which was the property of defendants Nos. 1 and 2, at an auction sale held in execution of a decree against the owners thereof, for Rs. 8,000. On 4th May 1899, Miran Bakhsh sold the well to Sayad Faqir Ali Shah, defendant No. 4, for Rs. 8,000. On 29th November 1899, Faqir Ali Shah sold one-third share of the well to Rama and Sahara, defendants Nos. 5 and 6. The plaintiffs brought the suit for pre-emption, out of which the present appeal has arisen, on 9th February 1900, against the original owners and Miran Bakhsh and Sayad Faqir Ali Shah, alleging that they being landowners in the village in which the well in dispute is situate had a preferential right of pre-emption in respect of it as against the auction-purchaser and the second vendee, who owned no land in the said village. On 26th February 1900, the plaintiff applied for Raman and Sahara, sub-vendees from defendant No. 4, to be impleaded as co-defendants, and they were impleaded accordingly.

It appears that at the time of the original auction sale, as also at the time when the re-sale to Sayad Faqir Ali Shah took place, the present plaintiffs-respondents were not land-holders in the village. It was their father, Irapat, who was a proprietor in the village at the time, and he having died some time in January 1900, the plaintiffs succeeded as his heirs to the land owned by him and brought the present suit in February 1900 to enforce the right of pre-emption which admittedly had accrued to their father in his life-time.

Various pleas were raised in defence to the plaintiffs' claim in the Court of first instance, but it is unnecessary to notice them at this stage of the case. It may, however, be noted, that the case came up to this Court once before in 1905 for decision of the question whether there had been a waiver of the right of pre-emption on the part of the plaintiffs' father, Irapat, in respect of the sales in question, and was remanded for decision on the merits after a finding on the point of waiver in plaintiffs' favour.

The Courts below have now decided that Faqir Ali Shah was not a land-holder in the village at the time of the sale to him in May 1899, and have accordingly decreed the plaintiffs' claim conditional on payments of Rs. 8,000. Two appeals have been preferred to this Court, one by Faqir Ali Shah and the other by Raman Mal and Sahara; the points raised in both the appeals being substantially identical, namely (1) that the plaintiffs had no *locus standi* to sue for pre-emption in respect of the sales in dispute as heirs of Irapat, their father, inasmuch as the alleged right of pre-emption was personal to Irapat, and not having been exercised by him during his life-time died with him and did not survive to the plaintiffs; (2) that the suit was bad for misjoinder of parties and of causes of action; and (3) the Faqir Ali Shah was a landowner in the village in which the well in suit is situate at that time of the sale to him, and that therefore the plaintiffs' right of pre-emption, if any, was not superior to his.

As regards the last two points, we are clearly of opinion that they are devoid of force. The objection as to misjoinder was not raised in the pleas and was not seriously pressed before us, and rightly, as we think that obviously the suit was not bad for misjoinder of parties and of causes of action. As to the contention that Faqir Ali Shah was a proprietor in the village at the time of the sale to him in May 1899, we need only say that after referring to the evidence upon the record, on which reliance was placed in argument on his behalf, we have no hesitation in agreeing with the concurrent

finding of the Courts below on this point, and we over-rule the contention as untenable.

There, then, remains the first point in regard to the plaintiffs' right to sue for pre-emption upon a cause of action which had accrued to their father in his life-time, and which, it was urged, did not survive to the plaintiffs as heirs to their father's land in the village in question. This point was pressed upon our attention by Mr. Grey with great force and earnestness in the course of a learned argument, and he cited the following authorities, which, though not precisely in point, he claimed as fortifying his position:—

Dhani Nath v. Butha, 136 P.R., 1894, *Rukan Din v. Ilam Lin*, 100 P.R., 1900⁽¹⁾, *Muhammad Ayub Khan, v. Rure Khan* 95 P.R., 1901⁽²⁾, *Lashkari Mal v. Ishar Singh*, 94 P.R., 1902⁽³⁾, *Dalgunjan Singh v. Kulka Singh I.L.R., XXII All.*, 1, *Ram Chand v. Durga Prasad, I. L. R, XXVI All.*, 61, *Mungal v. Sahib Ram, I. L. R, XXVII All.*, 544.

For the plaintiffs-respondents Mr. Harris relied on *Fateh Khan v. Muhammad*, 98 P.R., 1898.

We may note in passing that although the question of the plaintiffs' right to sue under the circumstances explained above was not raised by the defendants in their pleas in the Court of first instance nor in their grounds of appeal to the Lower Appellate Court, yet as it was specifically raised in the memorandum of appeal filed in this Court, and is a purely legal question (and not one of fact) depending for its decision on facts which are undisputed and apparent on the face of the record, we allowed the appellant's learned counsel to argue it. The respondents' counsel was in no way taken by surprise having had sufficient opportunity of meeting the case on the ground thus raised.

As the point urged by the appellant is one of some nicety and not free from difficulty, and as it is apt to arise in cases governed by the Punjab Pre-emption Act (II of 1905), and as after bestowing upon it our best consideration we are unable to formulate a definite opinion in regard to it, we think it desirable to refer it to a Full Bench for decision, and we refer it accordingly.

JUDGMENTS OF THE FULL BENCH.

CLARK, C. J.—*23rd May 1907.*)—Where a right of pre-emption is claimed under Section 12 of the Punjab Laws Act in virtue of being a land-

(1) a.c., 11 P.L.R., 1901. (2) a.c., 125 P.L.R., 1901. (3) a.c., 124 P.L.R., 1902.

holder the right is inherent in the land. No questions are asked as to nature of the land, as to whether it is ancestral or acquired, or as to how it was obtained, by inheritance or purchase; it is sufficient that the claimant owns the land.

It is clear, therefore, that ordinarily a transfer of land passes the right of pre-emption, and the loss of the land involves the loss of the right of pre-emption. So much so that a right of pre-emption already acquired is lost if the land which gave rise to it is parted with—*cite Atma Ram v. Deri Dyal*, 49 P.R., 1901⁽¹⁾ and *Muhammad Ayub Khan v. Rure Khan*, 95 P.R., 1901⁽²⁾.

The further question then arises whether such transfer of land does not pass the right of pre-emption on with reference to other lands already sold. *Primâ facie* there seems no reason why it should not.

It becomes convenient here to divide transfers into two clauses : (a) transfers by inheritance, (b) transfers by some voluntary act of the owner.

As regards the former there are no precedents. As regards the latter there are some precedents, the more important being *Sheo Narain v. Hira*, I. L. R., VII All., 535 and *Muhammad Ayub Khan v. Rure Khan*, 95 P.R., 1901⁽²⁾, which decide that in such cases the right of pre-emption does not pass.

The Allahabad case is a Full Bench case. Four of the Judges simply state their answer to the question referred without any discussion of subject. Mahmud, J., discusses the subject and referring to Muhammadan Law says :—

“ Under that law, when the ownership of the pre-emption tenement is transferred or devolves by act of parties or by operation of law, the transfer or devolution passes pre-emption to the persons in whose favour the transfer or devolution takes place ; but the rule is essentially subject to the proviso that such person cannot enforce pre-emption in respect of any sale which took place before such transfer or devolution. This rule must also be applied to the present case. The reason why, although the right of pre-emption runs with the land, the plaintiff in this case cannot be allowed to enforce it, is that to rule otherwise would in effect be to allow a ‘stranger’ to oust one who is not a ‘stranger’ at the time of the sale

* * * * *

* * * * *

“ If the purchaser at the later sale (and this is the position of the plaintiff here) were to be allowed to pre-empt in respect of the previous sale, the con-

(1) S.C., 157 P.L.R., 1901.

(2) S.C., 125 P.L.R., 1901.

sequence would be that whilst the purchaser in the earlier sale could maintain a suit to enforce pre-emption in respect of the later sale, the purchaser at such later sale could maintain a pre-emption suit in respect of the earlier sale. There would thus be two suits equally maintainable, but wholly inconsistent with each other, for each plaintiff would call the other a 'stranger' and the object of each suit would be to preclude the plaintiff in the other suit from the co-parcenary."

Mahmud, J's decision is based therefore mainly on the inconveniences and injustices arising out of a voluntary transfer, and none of his arguments apply to a transfer by inheritance. His view is even more apparent in *Rajjo v. Lalman, I.L.R., V A/L*, 180, where, after saying that the very object and basis of the right of pre-emption is to prevent the introduction of strangers as co-sharers in the property, he says: "The right is essentially based upon the injury which such inconvenience is supposed to cause. From its very origin and nature, the right of pre-emption is not one which is to be enforced merely as an instrument of capricious power or vindictiveness. It is a transient right in its very conception and nature, and being a personal privilege of the pre-emptor cannot be made the subject of sale or bargain of any other kind. Any attempt on the part of the pre-emptor to bargain with it, is taken to indicate conclusively that the injury of which the pre-emptor complains in suing to enforce pre-emption is unreal, and that the claim is not dictated by *bond fide* motives."

In addition to these objections, there is a very reasonable danger that once a desirable property has been sold, any number of persons hungering after that property might set about to buy small plots, not with any desire to own those plots but simply as a foundation for pre-emption suits. This would be a great hardship to the original vendee exposing him to a number of suits, which he had no reason to anticipate at the time of his purchase, and would be otherwise of very undesirable state of affairs.

While, therefore, there is good reason why voluntary transfers should not pass a right of pre-emption as regards properties previously sold, those reasons do not apply to transfers by inheritance. As regards transfers by inheritance the general principle should apply that the right of pre-emption passes with the land.

Mr. Grey laid great stress on sections 13 and 16 of the Punjab Laws Act urging, that the father was the person on whom the notice had to be served, and that it was he who had the right to sue, and that the right was thus a personal one that could not be inherited by the son. The right was no

doubt a personal one in the father based on his land, but I can see no reason why such right cannot be inherited by the son. If the father had waived or otherwise disposed of his right this would no doubt be binding on the son, as the father was representing the whole estate.

Where, however, the father has done nothing of the kind, but has simply taken no steps in the matter, there seems to me no reason why the son should not step into the shoes of his father and take the same action as the father could have done. The son inherits the other causes of action belonging to his father, and why not this one? Nor do I see why the son cannot come in under Section 16, simply alleging that no notice as required by Section 13 was served on his father.

I should, therefore, reply to the question referred that plaintiffs' right to sue for pre-emption upon cause of action which had accrued to their father in his life-time passed to them at his death on their inheriting his land.

ROBERTSON, J.—(25th May 1907).—I concur in the conclusion come to by the learned Chief Judge. When an involuntary transfer takes place by inheritance the succession to the land takes the whole bundle of rights which go with the land, and there is no *hiatus* in respect of the rights of pre-emption.

SHAH DIN, J.—(24th May 1907).—I agree in the answer to the reference as proposed by the learned Chief Judge.

REVISION SIDE.

No. 89.

CRIMINAL.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

HARYA,—(DEFENDANT),—PETITIONER,

versus

MUL CHAND—(PLAINTIFF),—RESPONDENT.

CASE No. 1015 OF 1904.

Civil Procedure Code (Act XIV of 1882), Sections 351, 352—Insolvency proceedings—Schedule not framed—Suit by creditor not barred.

Where in the insolvency proceedings no schedule was framed under section 352 of the Civil Procedure Code—

Held, that a suit by a creditor whose debt was acknowledged by the debtor in the list of debts filed by him with his application for insolvency was not barred—*I.L.R., VII Mad., 318 followed. 76 P.R., 1899 distinguished.*

Petition for revision of the order of Lala Mul Raj, Judge, Small Cause Court, Lahore, dated 7th January 1904.

Pandit Jowala Parshad, Pleader, for Respondent.

ORDER OF REFERENCE.

LAL CHAND, J.—(1st May 1906).—The Petitioners in the case were sued on a bond for Rs. 53 including interest. Harya, defendant, pleaded that he had already been declared an insolvent in proceedings to which plaintiff was a party and of which he had due notice, and that therefore plaintiff could not sue him on the bond. The other defendant, Jalal Din, pleaded that the amount due under the bond had been repaid by Harya, defendant, who alone had borrowed a further sum of Rs. 25, which was entered in the list attached to the application for insolvency, and therefore he could not be sued.

No evidence was produced by either side, and the lower Court proceeded to decree the claim as defendants admitted having executed the bond.

The lower Court has entirely ignored the pleas set up by the defendants. There may be some justification for ignoring the plea set up by defendant 2, as he did not produce any evidence to prove that the amount due under the bond had been repaid by Harya, defendant. But there was no ground for not deciding Harya's plea that he could not be sued as he had been declared an insolvent in proceedings to which plaintiff was a party.

This plea is repeated in the application for revision, and it is evidently necessary to consider and decide its validity. The insolvency proceedings show that the plaintiff was entered as a creditor in the list filed with the application for insolvency and the notice was duly served upon him among other creditors to show cause against the applicant being declared as insolvent. Plaintiff, however, did not appear, though some other creditors did appear, and ultimately, after recording evidence for the applicant, Harya, the Court declared him an insolvent under section 351, Civil Procedure Code, and called creditors to register their debts at the next hearing on the 22nd December 1900. The question is whether under such circumstances the plaintiff, whose name is entered in the schedule filed with the application for insolvency, is debarred from suing on his bond.

I am inclined to think he is not.

As I read Section 352, Civil Procedure Code, the declaration made under section 351 operates as a decree in favour of such creditors only who actually appear to prove their debts after declaration made under Section 351 and whose names as such are then entered in the schedule to be prepared by the Court under Section 352, Civil Procedure Code.

This view, however, does not appear to be quite consistent with the judgment in *J. B. Penhearow v. Partab Singh*, 76 P. R., 1899. There, apparently,

a schedule prepared before the declaration made under Section 351 was held to be a sufficient compliance with the provisions of Section 352, and plaintiff whose name was entered in that schedule was held as debarred from suing. So far as I can discover there is no provision in the Code for preparing a schedule before declaring insolvent under Section 351, and possibly I surmise that the schedule mentioned in the judgment, *J. B. Penhearow v. Partab Singh*, 76 P.R., 1899, was the list filed with the application for insolvency. If this surmise be correct it would not at all in my opinion comply with the provisions of Section 352, Civil Procedure Code. As already observed the schedule referred to Section 352, in a schedule prepared after the declaration under Section 351, and where no such schedule has been prepared owing to the non-appearance of the creditors to prove their debts, would the declaration under Section 351, operate as a decree in favour of creditors whose names are entered in the schedule attached to the original application for insolvency?

As the judgment in *Penhearow v. Partab Singh*, 76 P. R. 1899, is not clear and it is at least doubtful whether it was intended to apply to a case like the present, I refer the case to a Division Bench for decision. Parties to be informed.

JUDGMENT.

LAL CHAND, J.—(2nd February 1907).—The facts of this case are given in full in the referring order, and need not be recapitulated. The case appears to be on all fours with *Arunachala v. Ayyavu*, I. L. R., VII Mad., 318, and we agree with the view taken in that case and hold that the suit is maintainable.

Possibly there was some order in *J. B. Penhearow v. Partab Singh*, 76 P. R. 1899, adopting the list filed under Section 345, Civil Procedure Code, as a schedule under Section 352, Civil Procedure Code. There is none, however, in the present case, and we are not prepared to hold that a list of debts filed under Section 345, Civil Procedure Code, prior to a declaration under Section 351 Civil Procedure Code, is a schedule as required by Section 352, Civil Procedure Code. It is necessary that the Court should by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts, and then frame a schedule of such persons and debts. In the absence of any such determination by Court the declaration under Section 351, Civil Procedure Code, that the applicant was an insolvent cannot be deemed to be a decree in favour of the respondent for the amount due to him. The suit in consequence is not barred as *res-judicata*, and is maintainable. We dismiss the petition for revision but without costs, as the suit is due to respondent's own failure to prove his debt in the insolvency proceedings.

Application dismissed.

APPELLATE SIDE.

No. 90.

CIVIL.

Before Sir William Clark, Chief Judge, and Mr. Justice Reid.

INDAR,—(PLAINTIFF),—APPELLANT,

versus

ASA SINGH, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1025 OF 1907.

Adverse possession—Mortgagor and mortgagee—Assertion of proprietary right by mortgagee after invalid foreclosure proceedings.

Held, that a mortgagee, who has taken fruitless foreclosure proceedings, cannot by asserting himself to be the proprietor, and getting mutation in Revenue records in his favour, start a possession adverse to the mortgagor.

Further appeal from the decree of the Additional Divisional Judge, Hoshiarpore, dated the 4th June 1907.

Rai Sahib Lala Sukh Dial, Advocate, for Appellant.

Mr. Duni Chand, Advocate, for Respondents.

JUDGMENT.

CLARK, C. J. (5th March 1908).—The mortgage in this case was executed in favour of defendants on 8th May 1876. It was a mortgage by conditional sale and the mortgagee foreclosed under the Regulation in 1879; and at Settlement in 1882 the mortgagee claimed to be proprietor, and the mortgagor objected. The Settlement authorities decided in favour of the mortgagee, and in 1882 the land was mutated in favour of the mortgagee, who has been in possession since.

In 1907 the mortgagor sued for redemption, and the Divisional Judge has held that the mortgagee has had adverse possession since 1882 and that plaintiff's suit is barred by limitation.

The first Court held that the foreclosure proceedings were invalid, as they were taken in a Court having no jurisdiction to entertain such proceedings. The Divisional Judge has not touched this subject, but has simply held the claim to be barred by limitation.

The question for our decision is whether a mortgagee who has taken fruitless foreclosure proceedings can, by asserting himself to be proprietor, and getting mutation to that effect in his favour, start a possession adverse to the mortgagor.

The general rule has been stated by Lord St. Leonards in his "Handbook on Property Law", page 117, as follows:—"It has always been

"laid down that neither the mortgagor nor the mortgagee can, by any adverse act, bar the right of the other."

There are many decisions of the Indian Courts which support this view. *I. L. R.*, *XIV Mad*, 38; *XIV Bombay*, 279; *XVI Bombay*, 134; *XXXII Calcutta*, 296 and *Punjab Record* No. 49 of 1882.

We can see no reason for holding that the mortgagee's fruitless foreclosure proceedings should give rise to any exception to the general rule.

The *XIV Madras* case referred to above is somewhat similar; it was there held that, "The original character of the possession as mortgagee is not changed by the assertion of an absolute purchase of the property unless the alleged purchase is valid and binding."

We accept the appeal and hold that the mortgagee's possession was not adverse, and that plaintiff's suit is not barred by limitation. We set aside the order of the Divisional Judge and remand the case under Section 562 for fresh decision.

Costs of the appeal will follow the event. Court fee will be refunded.

Appeal accepted.

REVISION SIDE.

No. 91.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

DEVI DYAL AND OTHERS,—(DEFENDANTS),—PETITIONERS,

versus

AHMAD KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE NO. 1653 OF 1907.

Punjab Courts Act (XVIII of 1884), Sections 40, 70 (a)—Punjab Tenancy Act (XVI of 1887), Sections 116 (a), 117, 158 (2), XVIII—Jurisdiction of Civil and Revenue Courts—Suit for a declaration that an orchard on a portion of the village common land was planted by plaintiff alone at his own expense—'Land suit'—Pleadings, construction of—Partition proceedings—Question of title—'Mode of making partition'—Appeal treated as revision.

Held, that in this country pleadings are not to be strictly construed by their very letter, and the Courts have to consider what is the real point at issue between the parties.

The plaintiff prayed that a declaratory decree may be passed in his favor against defendants to the effect that a certain land occupied by a garden

solely belongs to plaintiff, because he planted the garden thereon and holds possession thereof. The object of obtaining this declaration was to induce the Revenue authorities, when partitioning the land, to allot this particular area to him in accordance with the provisions of the *Wajib-ul-arz*.

Held, that upon proper construction the suit was not a "land suit," and the suit having been valued at Rs. 400 no further appeal lay.

The appeal was treated as a revision and it was held that the suit was cognizable by Revenue Courts only, for the dispute between the parties was essentially one as to the allotment of a particular land as such, and there was no question of title involved in the suit, and the suit was excluded from the cognizance of the Civil Courts by section 158 (2) clause XVIII of the Punjab Tenancy Act.

Petition for revision of the decree of Moulvi Inam Ali, Divisional Judge, Shahpur Division, dated the 12th January 1907.

Bhagat Ishwar Das, Pleader, for Petitioners.

Mr. Duni Chand, Advocate, for Respondents.

ORDER OF REFERENCE TO A DIVISION BENCH.

RATTIGAN, J.—(20th February 1907).—On behalf of the respondents, Mr. Duni Chand raises the preliminary objection that no further appeal lies in this case as the suit is not a "land suit" but an unclassified suit of the jurisdictional value of Rs. 400. The learned counsel contends that all that the plaintiff, properly construed, really asks for by way of relief is a declaration to the effect that the plaintiff planted a garden in the 2 *kanals* 12 *marlas* of land in question and nothing more. In support of his contention he refers to the issue framed by the first Court, *viz.*, "whether the orchard in question was separately planted by the plaintiff at his own expense, and whether he alone is in possession thereof." Whether the other co-sharers did not take part in planting the orchard, and whether they are in possession thereof?

Mr. Duni Chand further relies upon the decree of the Divisional Court. This decree was to the following effect: "A decree be passed declaring that plaintiff planted the garden in suit by his expenditure and labour and raised it to its present condition."

With this decree (which obviously does not *per se* give plaintiff any right in the land) the plaintiff is perfectly content, and Mr. Duni Chand's argument (as I understand it) is that, whatever may be the actual wording of the plaint, the plaintiff does not in this suit seek

from the Civil Courts any further relief than that awarded to him by the lower Appellate Court. He merely wants (so argues his counsel) a declaration that it was he who planted the garden, and if he gets this declaratory decree, he intends to realize it hereafter for the purpose of inducing the Revenue authorities, when partitioning the land to allot this particular area to him in accordance with the provisions of the *Wajib-ul-arz*. But this declaratory decree, though it is hereafter to be made use of in this way, is not (so Mr. Duni Chand contends) intended of its own vigour to give plaintiff an absolute right to the land. This is a matter which will have to be decided by the Revenue authorities in the partition proceedings. I confess there is considerable plausibility in this argument. The plaint as framed, is, no doubt, against the contention, for in it the plaintiff distinctly prays that "a declaratory decree may be passed in favour of plaintiff against defendants to the effect that 2 *kanals* and 12 *marlas* of land occupied by a garden solely belongs to plaintiff, because he "planted the garden thereon and holds possession thereof." But pleadings are not to be strictly construed, in this country, by their very letter and the Courts have to consider what is the real point at issue between the parties. In the present case it seems to me, despite the wording of the plaint, that the real relief which plaintiff asked for was a declaration that it was he who had planted the garden and that he did not intend to claim from the Civil Court a declaration that by so doing he had become the owner of the area in question. But this was well understood to be the real meaning of the plaint is, I think, clear from the issue drawn by the Court on the pleadings and also from the provisions of the *Wajib-ul-arz* upon which the plaintiff relies. These latter are to the effect that *when partition takes place*, an orchard which has been planted on common land by one of the co-sharers is to be allotted to that co-sharer if he proves that it was he who planted it separately and by his own labour. Further, the fact that lower Appellate Court so construed the plaint, and that the plaintiff accepted without demur the relief granted to him by that Court, is a strong argument in support of Mr. Duni Chand's contention that this is the proper construction to be placed on the wording of the plaint. I, of course, do not hold that the nature of a suit, *qua* its jurisdictional character, is to be decided by the relief granted. But it seems to me that the cases cited by Mr. Ishwar Das on this point, *viz.*, *Hazara Singh v. Lal Singh* 63, *P. R.*, 1891 and

Muhammad Khan v. Ashak Muhammad Khan, 106 P. R., 1895, (F. B.) are not really relevant. The question here is as to the right construction of the plaint. Did plaintiff ask from the Court a declaratory decree which *per se* would give him an interest in the land, or did he ask merely for a decree which could at a subsequent period be made use of by him for the purpose of inducing the Revenue authorities to give him that interest in the said land? If merely the latter, then decree of the Court would, in itself, no more affect the land than would an agreement to execute a conveyance of land. In the latter case the promisee could sue for specific performance of the agreement, and, if successful, could obtain possession of the land. But the agreement whereby he effected that result of itself would not create an interest in the land. So, in the present case, though the plaintiff might be able to utilize the declaratory decree for the purpose of securing the allotment of this land to himself when it was partitioned by the Revenue authorities, the decree would not *per se* give him an immediate right to or interest in the land. It would merely declare that it was he who had planted the garden, and this is all that the decree granted by the Divisional Judge does declare. Looking then to all the facts of the case, I do not myself think that the plaintiff is bound, *qua* this question, by the strict letter of his plaint. The issue (and the only issue) drawn in the case, and the plaintiff's acquiescence in the decree granted by the Divisional Judge, seem to me to suggest that he merely asked for a declaration that it was he who planted the garden, and that consequently the suit is not a land suit.

As, however, the point is a novel one, and of some considerable interest, I refer it to a Division Bench for determination.

JUDGMENT OF THE DIVISION BENCH.

SHAH DIN, J.—(17th July 1907).—For the reasons recorded in the referring order of my brother Rattigan, in which I fully concur, and which I need not repeat in my own language, I would hold that the suit out of which this appeal has arisen is not a “land suit,” and that consequently no further appeal lies in this case as of right.

I may add that it appears to me to be exceedingly doubtful whether the question in dispute between the parties, which arose in the course of the partition proceedings held by the Revenue officer, was at all a “question as to the title in the property of which partition was sought” within the meaning of clause (a) of Section 16 of Act XVII of 1887,

and whether the Revenue Officer was competent to proceed to determine the question in dispute as though he were a Civil Court under Section 117 of the Act. I am inclined to think, having regard to the provisions of the *Wajib-ul-arz* upon which the plaintiff relied both before the Revenue Officer and in the Court below, and to the statements of the parties before the Revenue Officer, that the question in dispute, namely, whether the garden having been planted on a part of the common land by the plaintiff by his own individual labour and at his own cost, should, or should not, according to the rule laid down in the village administration paper, be allotted to the plaintiff at partition, was a question relating to "the mode of making partition" within the purview of Clause (b) of Section 116, and that the Revenue Officer could and should have decided it under Section 118 of the Act. That a question of this description is not a question of title in the property of which partition is sought is made further clear by a reference to Section 158 (2), clauses (XVII) and (XVIII) of the Act, especially the latter clause, according to which a Civil Court cannot exercise jurisdiction over "any question as to the allotment of land on the partition of an estate, holding, or tenancy." The question in dispute between the parties in this case which was mooted before the Revenue Officer was, in my opinion, clearly a question as to the allotment of the garden (said to have been planted by the plaintiff alone) on the partition of the joint holding No. 33, and was as such excepted from the cognizance of a Civil Court.

The point discussed above is not, however, directly before this Bench, and I do not, therefore, feel called upon to record an expression of my final opinion on it. I have ventured to touch it briefly as it was, at my suggestion, made the subject of argument at the Bar, and is one which may possibly crop up before the final decision of this case.

I would hold that the suit is not a land suit, and that no appeal lies as of right in this case. The case would be remitted to Single Bench for disposal on the merits.

RATTIGAN, J.—(17th July 1907).—I quite agree with my brother's views as above expressed and have nothing further to add.

JUDGMENT.

RATTIGAN, J.—(3rd August 1907).—The Division Bench has decided that the suit is not a "land suit," and that consequently no further appeal lies. Mr. Ishwar Das, however, contends that the Civil Courts

had no jurisdiction to entertain the claim which was one cognizable solely by the Revenue authorities, and he prays that his memorandum of appeal may be treated as an application for revision.

There seems to me to be force in this contention. The present suit arose out of partition proceedings. The Revenue Officer who was conducting these proceedings was of opinion that the question as to how the land in dispute should be allotted was one "as to title in the property of which partition was sought," within the meaning of Section 116, clause (a) of the Punjab Land Revenue Act, 1887.

The plaintiff was accordingly directed to establish his title in the Civil Court.

In the plaint the plaintiff expressly relies upon the provisions of the *Wajib-ul-arz*, and he prays that he may be granted a declaratory decree to the effect that by planting the garden in question he has become owner of the land and *is entitled to be allotted that land on partition*. This was also his claim before the Revenue Officer, and under these circumstances, and having regard to the provisions of the village administration paper, I am of opinion that the question before the Revenue Officer was one relating to the "mode of partition" within the meaning of Section 116, clause (b) of the Punjab Land Revenue Act, and that consequently the Revenue Officer should have himself decided it in his executive capacity. The dispute between the parties is essentially one as to the allotment of a particular plot of land as such it was, I consider, excluded from the cognizance of the Civil Courts by Section 158 (2), clause XVIII of the said Act. This was also the opinion of the Division Bench, though the point was not actually before them.

I hold, therefore, that the Civil Courts had no jurisdiction to entertain the suit, and I accordingly accept the application and, reversing the decree of the lower Appellate Court, I dismiss plaintiff's suit.

As regards costs, I think the most equitable order to pass is that the parties should each bear their own. The mistake was that of the Revenue Officer, and plaintiff had no choice but to bring this suit. Moreover, the objection as to jurisdiction was not raised in the lower Courts; no doubt because the suit was then treated as a land suit, but still the point was not raised. I, therefore, leave the parties to bear their own costs throughout in all the Courts.

Application accepted.

APPELLATE SIDE.

No. 92.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Robertson.

RAJO AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

versus

KARAM BAKHSH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 460 OF 1900.

Custom—Alienation by sonless proprietor—Daughters—Remote collaterals—Rattal Jats of Jallo village, Lahore District.

Held, that according to custom prevailing among *Rattal Jats* of Jallo village, Lahore District, collaterals related in the eighth degree to a sonless proprietor were not entitled to object to an alienation of ancestral land made by the proprietor in favour of his daughters.

Further appeal from the decree of H. Maude, Esquire, Divisional Judge, Lahore Division, dated 7th March 1900.

Mr. Muhammad Shaffi, Advocate for Appellants.

Lala Tirath Ram, Pleader for Respondents.

ORDER OF REMAND.

ROBERTSON, J.—(16th November 1904).—The point involved in this case is one of considerable importance and the decision of this Court upon it will no doubt be taken as a precedent. We do not feel at present that we are in a position to decide it satisfactorily.

The claimants on the one side are collaterals as far distant as the eighth degree from the deceased, whose property is in question, and on the other side are the daughters of the deceased, in whose favour deceased had made a Will. The fact of this Will having been executed, we understand, is not disputed. The question of *onus* has not been fully considered, and the facts on the record are meagre. It is true that in Mr. G. C. Walker's volume of Customary Law, page 10, answers by *Jats* extremely antagonistic to the rights of daughters are given, but we feel that in the case of Muhammadan *Jats*, the views expressed may possibly be too unreserved, and we think it very desirable that a full enquiry should be made. The views expressed in *Arur Singh v. Musammat Lachmi*, 75 P.R., 1898, must be considered with the remarks on the same point in *Dilawar v. Mussanmat Jatti*, 2 P. R., 1901⁽¹⁾. Especially in

(1) s. c., P. L. R., 1900 p. 318.

connection with the rights of daughters it is frequently found in practice that custom allows collaterals within a certain degree to exclude females, while it denies the right to those further removed.

This is pointed out in Rattigan's Customary Law, page 15, paragraph 10, and many of the judgments to which our attention was drawn, *vis.*, *Haidar Khan v. Jahan Khan*, 50 P.R. 1902⁽¹⁾, *Gurditta v. Mussammat Preman*, 48 P.R. 1889, *Ranjhi Khan v. Mussammat Kamun*, 179 P.R. 1889, *Jiwi v. Gahiya*, 98 P.R. 1891, *Ladhu v. Daulti*, 126 P.R. 1890, *Arur Singh v. Mussammat Lachmi*, 75 P.R. 1889, *Lehna Singh v. Buta*, 135 P.R. 1894, *Ramzan Shah v. Sohna Shah*, 60 P.R. 1889, *Chatra v. Dera*, 92 P.R. 1879, *Mussammat Gulab Khatan v. Mian Muhammad*, 5 P.R. 1898, *Karm Din v. Gurditta*, 101 P.R. 1893, *Nizam Din v. Shahab-ud-din*, 108 P.R. 1900⁽²⁾, *Hassan v. Jahana*, 71 P.R. 1904⁽³⁾, bear on this point. We think it desirable, therefore, to remand the case for a full enquiry on this point.

Issue—

- (1) The deceased, Raushan, having made a Will in favour of his daughters bequeathing his immovable property to them, can the plaintiffs, being collaterals of Raushan in the eighth degree, contest this alienation, Raushan being a childless full owner?
- (2) Who would be entitled to succeed to Raushan's property, the daughters or collaterals in the eighth degree, in the absence of a Will?

The question of *onus* being an extremely doubtful one, we do not fix the initial *onus* on either party, but direct that each side shall be allowed to produce all the evidence they can obtain, the *onus* being equally on both. The enquiry will be made by the first Court, and the learned Divisional Judge in forwarding the return will kindly give us the aid of his opinion.

JUDGMENT.

ROBERTSON, J.—(29th March 1907).—This case was remanded under Section 566, Civil Procedure Code, by our order of 16th November 1904, for further enquiry on two issues :—

(1) s. o., 65 P. L. R., 1902.

(2) s. o., P. L. R., 1900, p. 548,

(3) s. o., 96 P. L. R., 1904.

- (1) The deceased Raushan, having made a Will in favour of his daughters bequeathing his immovable property to them, can the plaintiffs, being collaterals of Raushan in the eighth degree, contest this alienation, Raushan being a childless full owner ?
- (2) Who would be entitled to succeed to Raushan's property, the daughters or collaterals in the eighth degree, in the absence of a Will ?

It is admitted that Raushan's alienation of the property, and that the right of the daughters to succeed even without a Will, could not be contested as regards Raushan's self-acquired property.

The parties are Muhammadan Rattal *Jats* of Jallo, *tahsil* Lahore.

A careful enquiry has been made : albeit instances of real value on either side are not numerous, and both the District Judge and the Divisional Judge have reported against the right of the daughters to succeed in presence of collaterals of the eighth degree, even when the daughter's rights are fortified by a Will.

The question of *onus* was deliberately left open by our order of remand of 16th November 1904, which should be read with this.

The daughters are in possession and have clearly a colorable title by right of succession and under the Will. As plaintiffs, therefore, it so far lay upon the plaintiffs to show a superior title.

Notwithstanding the views of the Lower Courts we think that in this case the claims of the plaintiffs, collaterals in the eighth degree, to oust daughters in whose favour a Will has admittedly been executed, must be held to fail. The decision by the Full Bench in *Mussammat Bano v. Fateh Khan*, 48 *P. R.* 1903⁽¹⁾, (F. B.), has practically restored the view taken for many years by various able Judges of this Court that there is little material distinction between an alienation by Will and one by gift.

The real question here is "are the collaterals of the eighth degree "too distantly related to possess the right to oust the daughters"?"

We do not dispute the logic of the principles laid down in *Arur Singh v. Mussammat Lachmi*, 75 *P. R.*, 1898, to which judgment one of the Judges of this Bench was a signatory, but it is impossible to contest the view

(1) s. c., 111 *P. L. R.*, 1903 (F. B.)

that as a matter of fact custom in this matter is not based upon pure logic and that it is a fully and practically universally recognised principle that near agnate collaterals have power of veto as regards alienations and preferential rights of succession in respect of daughters which are not recognised in respect of more distant collaterals as pointed out in *Dilawar v. Mussammat Jatti*, 2 P. R. 1901⁽¹⁾, this is constantly found to be the case, and is based upon sound views of common sense and expediency. As a matter of fact pedigree tables which extend beyond the seventh or eighth degrees, are, in most cases, as visionary as those which in the case of some exalted families derive descent from the sun and moon, and the people fully recognise this. And though Hindu Law in its strictness is never followed in agricultural communities, yet the influence of ideas inherent in Hindu Law is certainly not without its effect upon customary law in the case of Hindu tribes or tribes of Hindu origin.

Now in the well-known Full Bench Ruling in *Gujar v. Sham Das*, 107 P.R. 1887, (F. B.), which is the foundation of the modern exposition of the agnatic theory, it is very clearly laid down by Plowden, J., page 248, that "custom varies as to the degree of propinquity which entitles a collateral to interpose." It has been found, as a rule, that collaterals beyond the fifth degree or at most the seventh degree of relationship are not recognised as entitled to control the action of a sonless proprietor in respect of disposition. No Full Bench ruling has so far as we know ever receded from that position, and we believe it to be more in accordance with the facts than the more logical view taken in *Arun Singh v. Mussammat Lachmi*, 75 P. R. 1898, as has been recently said in another judgment of this Court :—"The true spirit of Customary Law is neither more nor less than the custom which is proved to exist." *Dilawar v. Mussammat Jatti*, 2 P. R. 1901⁽¹⁾. Very good reasons have been given in *Ala Bakhsh v. Buta*, 79 P. R. 1891, for holding that the view taken in the well-known Full Bench ruling in *Gujar v. Sham Das*, 107 P. R. 1887, (F. B.) is correct and that the fifth and the seventh degrees are in general the limits within which collaterals are entitled to contest an alienation. In our referring order a large number of rulings was quoted, and it was decided that there was in this case no presumption in favour of the rights of the collaterals in the eighth degree to oust the

(1) s. c., P. L. R., 1900, p. 318.

daughters. The Judges of that Bench were the same as those who decided *Arur Singh v. Mussammat Lachmi*, 75 P. R. 1898.

There being no presumption in favour of the plaintiffs, although there was no presumption against them, can they be said to have made out a sufficient case? No doubt there is a large amount of oral evidence of males, but such evidence in defeasance of the rights of females recalls to one's mind the remark attributed in the fable to the tiger when he was shown the picture of a tiger running away from an old woman. "If a tiger had painted the picture he would have been "eating the old woman." No woman are able to come forward to protect their own interests, and it behoves us to be the more careful to see that they are not unduly sacrificed.

Now, although the instances may not be very perfectly established as to all particulars, there is no doubt that there have been two instances of the succession of daughters in the village of Jallo itself in which the land in question is situate.

On the other hand, there certainly is no reliable evidence of any collateral, as far removed as the eighth degree, having successfully contested an alienation to, or succession by, a daughter among Muhammadan Rattal Jats. Arjan Singh, P. W. 6, mentions a case in which he himself being a collateral of the tenth degree contested an alienation, but the record of the case was not produced. Bhagat Singh, P. W. 10 mentions *per contra* a case of daughter's son's succession. The other instances given are either instances of claims by collaterals within the seventh degree, or are too vague to be of any value. After going through the whole record, and considering the authorities on the point, *Gujar v. Sham Das*, 107 P. R., 1887, (F. B.) *Ala Bakhsh v. Buta*, 79 P. R. 1891. *Karm Din v. Gurditta*, 101 P. R., 1893, *Dilawar v. Mussammat Jatti*, 2 P. R. 1901⁽¹⁾ *Arur Singh v. Lachmi*, 75 P. R., 1898, *Ishar v. Ganda Singh*, 41 P. R., 1900⁽²⁾, which are nearly all quoted in our referring order, we are of opinion that the plaintiffs have not established any superior right and that their suit must fail. We accordingly accept the appeal and dismiss the claim with costs throughout on the ground that it is not shown that collaterals of the eighth degree have the right to contest an alienation to a daughter or to succeed in preference to a daughter among the Muhammadan Jat tribe of Rattal.

Appeal allowed.

(1) S. C., P. L. R., 1900, p. 818.

(2) S. C., P. L. R., 1900, p. 343.

APPELLATE SIDE.

No. 93.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Rattigan.

GANGA RAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

ABDUL RAHMAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1184 OF 1905.

Civil Procedure Code (Act XII of 1882), Section 43—Splitting of claim—Cause of action—Principal and interest, both falling due—First suit for recovery of either of them—Subsequent suit when barred.

When under the terms of a bond both principal and interest have become due, and the plaintiff sues for recovery of either of them, his subsequent suit for the other is barred under section 43 of the Civil Procedure Code, but when after the first suit for interest a second suit for principal is filed the latter is not barred if at the time of the first suit the principal had become due on a condition which it was optional with the creditor to enforce or not, for no one is bound to enforce a forfeiture.

First appeal from the decree of Captain A. A. Irvine, District Judge, Simla, dated 24th July, 1905.

Mr. Gouldsbury, Advocate, for Appellants.

Mr. K. C. Chatterji, Pleader, for Respondents.

CHATTERJI, J.—(1st December 1906).—The material facts of this case are briefly these. On 14th August 1897 the defendants-respondents executed a mortgage of certain house property in Simla for Rs. 6,000 in favour of the plaintiffs-appellants on the following terms:—

The mortgagors were to remain in possession, but to pay 15 per cent. per annum interest on the mortgage money, and to make payments of amounts due for the same in October and June during the currency of the mortgage, the first payment being made in October 1897 and the next in June following. If instalments of interest were not paid at the stipulated time compound interest would run at the same rate. The principal of the mortgage-money was to be paid in half-yearly instalments of Rs. 600 each, commencing from June 1898. If two successive instalments of the principal were in arrears, or if the last instalment was not paid in full, the plaintiff-mortgagees were to be at liberty to realize the whole sum due to them from the mortgaged property or other property of the mortgagors.

The mortgagees were to be at liberty to sue for unpaid interest or compound interest after due date, or to sue for the same along with the principal.

The mortgage was for one year certain, after which mortgagors were to be at liberty to repay the mortgage debt in whole or in part if they were so disposed.

It appears that certain payments on account of interest were made, but none towards the principal, the whole of which remained outstanding. Plaintiffs brought a suit for the interest due to them on 23rd August 1904 and obtained a decree. They brought the present suit for the principal and subsequent interest on 17th April 1905.

The defendants pleaded *inter alia* that suit was barred by Section 43 of the Code of Civil Procedure in consequence of the present claim not having been included in the previous suit. Their other pleas need not be recited here.

The District Judge of Simla, who tried the suit, upheld the objection and dismissed claim as barred by Section 43, Civil Procedure Code, and this is the only point raised in the present appeal. The case has been fully argued and a mass of authorities has been quoted on both sides.

Section 43 requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and further provides that if a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted.

The terms "cause of action" has been nowhere defined in the Code, and the superior Courts in India have therefore derived its meaning from extraneous sources coupled with the context of the sections in which it has been used. The ordinary and most comprehensive sense in which it is understood in England includes every fact which is material to be proved to entitle the plaintiffs to succeed and every fact which the defendants would have the right to traverse (*Cook v. Gill L. R.*, VIII C. P. 107.), *Read v. Brown L. R.*, XXII Q. B. D., 128. Their Lordships of the Privy Council have declared it to have reference to the grounds set forth in the plaint as constituting his right to sue, or, in other words, the *media* on which plaintiff asks the Court to arrive at a conclusion in his favour (*Chand Kour v. Pertab Singh L. R.*, 15 I. A. 156. In *Haramoni Dassi v. Hari Churn Chawdhry, I. L. R.*, XXII Calc. 833, it was held that for purposes of Section 26 of the Code, "cause of action" means

merely the facts constituting the infringement of the rights of the plaintiffs and not also those constituting their right. But there is a consensus of opinion that it has the wider signification in Section 43 *Musti v. Bhola Ram*, I. L. R. XVI All., 165, *Banke Behari Lal v. Pokhe Ram*, I. L. R., XXV All. 48; *Ram Prasad v. S. M. Surhi Dasvi*, 6 Cal., W. N., 585; *Nuwab Muhammad Kabir Khan v. Muhammad Bhag Bhari*, 17 P. R. 1897. The mortgage deed appears to create the following primary rights of the plaintiffs against the defendants and the corresponding obligations on the part of latter.

A.—As respects the principal—

- (i) That it was to be paid in six monthly instalments of Rs. 600 each.
- (ii) That the whole was payable within five years.
- (iii) That if two instalments remained in arrears, the whole sum outstanding was claimable by the plaintiffs.

B.—As respects interest—

- (i) That it was payable at 15 per cent. per annum every six months² the first instalment falling due in October 1897.
- (ii) That if any instalment remained in arrears compound interest was to be paid on the same at the rate stipulated for simple interest.

When the first suit for interest was brought the whole of the principal had fallen due under the contract, all the instalments being then overdue.

The plaintiffs contend that every breach of the individual covenants in the deed gives rise to an independent right of action, i.e., is a separate cause of action, and they further rely on the express provisions in the deed as to their being able to sue if default was made in the payment of interest. The following authorities were cited on their behalf : *Ram Bhaj v. Devia*, 123 P. R., 1881; *Jashwant Narayan Kamat v. Vithal Dinakar Parulekar*, I. L. R., XXI Bombay 267, *Badi Bibi Sahibal v. Sami Pillai*, I. L. R. XVIII Madras, 257; *Firapati v. Nara Simha*, I. L. R., XI Madras 210.

The last case may be disposed of in a few words. It was ruled in it that when a suit had been brought for *mesne* profits of certain land and dismissed on a technical point, a subsequent suit for possession of the land and *mesne* profits was not barred by Section 43 of the Code. It was held that the suit for *mesne* profits

the suit for ejectment were not based on identical causes of action, and this was the view taken by a Full Bench of this Court, *Raja Bikrama Singh of Faridkot v. Prab Dial*, 129 P. R. 1889. This case has no bearing on the question before us.

In Jeshwant Narain's case it was held that the breach of a covenant in a mortgage-deed to pay interest each year which is not confined to the fixed period of the mortgage is distinct from, and independent of, the claim of the mortgagee to recover the principal sum and the performance of which is secured in a different manner and gives rise to a distinct cause of action which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not, under Section 43 of the Civil Procedure Code, bar a subsequent suit for principal and interest by sale of the mortgaged property. The mortgage deed which was for a term of five years was dated 24th March 1873, and there was a stipulation to pay interest; and the mortgagee was given the right to take possession to secure it, the mortgagee undertaking to pay the surplus, if any, to the mortgagor. In 1881, the plaintiff sued for arrears of interest up to the end of 1881 and got a decree. In 1892 the mortgagee sued for the principal and remaining interest, seeking to recover both from the sale of the mortgaged property and the suit was held not to be barred. The facts of this case are materially analogous to those of the present one and the judgment is an authority in favour of the plaintiffs. We shall have occasion to refer to it again.

Ram Bhaj v. Davia, 123 P. R., 1881 and *Badi Bibi Sabikal v. Sami Pillai*, I. L. R., XVIII Madras, 257 may be noticed together. In both these were bonds in which terms were fixed for payment of the principal amounts secured by them, and there were stipulations for payment of interest as it accrued from time to time, and clauses providing that if interest was in arrear for a certain time the principal also could be claimed though the time for payment fixed in the bonds had not arrived suits having been brought for interest fallen due, subsequent suits for the principal and further interest after the expiry of the terms for payment were held not to be barred. It was ruled that suits for interest could be brought under the terms of the bonds and that penal clauses by which the principal became payable on failure to pay interest as agreed did not compel the plaintiff to sue on such defaults as no one is bound to enforce a forfeiture. This does not touch the question. It must be conceded, however, that in the Punjab case the first suit was brought when the principal of the bond had fallen due under the agreement without reference to the forfeiture clause and non-payment of the interest, and it was ruled that the claims under the first and second suits were

and based on distinct causes of action, the plaintiff having in each instance sued for the whole claim arising *ex una obligatione*. We shall return to this ruling after we have examined all the important authorities cited by counsel to notice.

The other cases quoted for the appellant need not be mentioned here as they do not specially touch the question we are considering.

For the respondents reference was made *inter alia* to *Duncan Brothers, & Co., v. Jeet Mull Gredhwaree Lall*, 1. L. R., XIX Calcutta, 372 following the opinion of Mr. Justice Wilson in *Anderson, Wright and Company v. Kalagarla Sarji Narain*, 1. L. R. XII Cal., 339. In these cases contracts of sale and purchase of goods had been broken by the purchaser in part by refusal to take delivery, and in part by refusal to pay for goods delivered, and it was held that the seller was debarred by Section 42 of the Code from bringing separate suits on the two breaches, his claim being one arising out of the same cause of action and based on one and the same contract.

In *Hikmat Ullah Khan, &c. v. Inam Ali and others*, 1. L. R. XII All. 203, the Allahabad High Court held that, when a mortgage-deed, provided that possession was to be given that the mortgage was to be for four years certain, and that certain interest should be payable and recoverable from the profits and the mortgagee never obtained possession, but sued for interest at the end of three years and obtained a decree, a second suit for the principal instituted after the expiry of the term of the mortgage was barred. The Court considered that the only cause of action of first suit was the non-delivery of possession and that plaintiff had no other for the second suit.

In a recent Madras case *Rangayya Goundan v. Nanjappa Rao, &c.* 1. L. R., XXIV Madras, 491, the plaintiffs had previously sued for possession and damages for breach of a contract for the sale of a coffee estate, and their Lordships of the Privy Council held that a subsequent suit by them to enforce specific performance of the contract was barred, inasmuch as the contract was the only cause of action in both cases.

In a still later case in *Shan Mugim Pillai v. Syed Gulam Ghose*, 1. L. R., XXVII Madras, 116, the plaintiff had filed a suit under a rent-deed, arrears of rent for Fasli 1306 and got a decree, and it was ruled that a subsequent suit for the rent of Fasli 1305 under another rent-deed was barred.

The Court held that though there were separate rent deeds, the cause of action was but one, *viz.*, the non-payment of rent by the tenant to his landlord.

No doubt every breach of a primary right gives rise to a cause of action and thus where a bond besides fixing a date for the payment of the principal stipulates for payment of interest in a certain manner, the non-payment of the interest in that manner creates a right of suit, as was ruled in *Ram Bhoj v. Devia*. But this does not settle the further question whether when several breaches of covenants made under one contract have occurred, suits will separately lie on the several breaches. In such a case there appears to be an identity of the causes of action of the several suits and they cannot therefore be separately brought. Taking the comprehensive definition of "cause of action" in *Cooke v. Gill* and the other authorities mentioned before it is clear that the contract has to be mentioned and set forth in every case and its existence, scope or validity would be in issue or material in all of them. In *Rangayya Goundan's* case cited *supra* the plaintiffs had the right to possession as well as to completion of the contract of sale, and had to rest their claim for relief in both the cases they instituted on the contract, and although the breaches complained of were different it was held by their Lordships of the Privy Council, this did not differentiate their causes of action which was but one, *viz.*, the deed of contract. Their lordships have laid down in *Surjmani Dye v. Sada Nand Mohaputta*, *L. R. 15 I. A. 66* that "the term "cause of action" is to be construed with reference rather to the substance than to form of action."

To take the line of argument followed in *Ram Bhoj v. Devia* when the defendants failed to pay interest as stipulated in the bond, the plaintiff, if he sued as soon as the first breach occurred would sue for the whole claim *ex una obligatione*, but if a second breach also occurred at the time of suit, the plaintiff suing for his remedy for one only of the breaches could not be said to do so under the provisions of Section 43. One way of looking at the matter is that at the date of the second breach the right of action based on the first breach, if it is not barred by limitation, is merged in that arising out of the second breach so that he has but a single claim in respect of his cause of action, *viz.* the bond. To hold that each breach constitutes a cause of action which subsists independently even after a subsequent breach has occurred, would be putting a very narrow signification on the expression "cause of action" and be opposed to the view of the Privy Council in the case of *Surjmani Dye*, *L. R., 15 I. A. 66*.

The scheme of the Code is at all events against any such argument. The illustration to Section 43 sets it at rest. It contemplates that all covenants to be

performed under any contract before the suit is brought are to be treated as joined and merged into one by the contract, and the breach of all the covenants enforceable before that time deemed as one breach. The object is of course to avoid multiplicity of actions. A running account not consolidated into a single liability by a balance struck or account stated is deemed to be a single cause of action for otherwise a separate suit might be brought on each item of account.

Ram Bhoj v. Deria, 123 P. R., 1881 does not contain anything militating against our view, and the learned reasoning of Mr. Justice Rattigan is quite compatible with it. We entirely agree with him that the plaintiff in that case was not bound to create a cause of action by enforcing a forfeiture, but could at his option waive it, the only way in which the judgment seems to tell in favour of the appellants is that the claim there was held not to be barred and was decreed though the facts were very analogous to those of the present case. The plaintiff brought his suit for interest after the principal had fallen due under the stipulation in the bond and not in pursuance of the penal clause. As to this we can only observe that the learned Judges apparently did not advert to it, and that their reasoning nowhere is based on it, so that it is fair to assume that, had they noticed the fact, they probably would not have granted the plaintiff a decree.

The facts of Jeshwant Narain's case are, as already observed, also similar to those of the present one, but the judgment does not notice them, though the reasoning of the learned Judges can be said to cover them. They do not expressly mention the fact that the mortgage debt had fallen due when the suit for interest was brought.

The learned Chief Justice draws a distinction in favour of allowing the claim to proceed on the ground that the covenant to pay interest, which was not confined to the fixed period of the mortgage was distinct from, and independent of, the claim of the mortgagee to recover the principal sum and its performance was secured in a different manner; "its breach" **he says, "gives rise to a cause of action which can be sued upon without suing for the principal." If the distinction is well founded, which is not very clear to our minds the case is not on all-fours with the present case and should be excluded from consideration. The learned Chief Judge then refers to covenants to pay interest which is inserted in all well-drawn English mortgage-deeds for the purpose of enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter. We have

considerable difficulty in following this argument, for we are of opinion that though the English law on the subject may be different, *see Dickinson v. Harrison*, 4 Price, 282, and *Mugan v. Rowlands*, L. R. 7 Q. B. D. 493, there is no means in India of evading the provisions of Section 43 by a contract in direct contravention of its term. When principal and interest are both due the section says there can only be one suit for both. This cannot be overridden by an agreement between the debtor and creditor that separate suits might be brought. The last clause of the section relating to collateral securities which introduced an innovation from the pre-existing Indian practice founded on English law, fully illustrates the comprehensive scope of its provisions. In any case we cannot follow this authority in the face of the other rulings we have cited in our judgment and particularly those of their Lordships of the Privy Council. In an earlier case *Anappa, &c. v. Ganpati &c.*, I. L. R., V Bombay 181, the Bombay Court (*Westropp, C. J.*, and *Kemball, J.*) laid down the same doctrine.

In the present instance the plaintiff sued for interest alone when the principal had all fallen due, according to the terms of the mortgage-deed. Had they sued for interest before that period, even though two instalments of interest were in arrear, the bar would not have arisen, for as laid down in *Ram Bahj v. Devia* and *Badi Bibi's* case, no one is bound to enforce a forfeiture. But in the circumstances that existed, when the plaintiffs' first suit was brought, the cause of action for recovery of the principal had accrued. And the cause of action for interest had, under the Code, become merged into one, and the present claim for principal, which was omitted from the former claim is clearly barred.

The decree of the District Judge is thus right, and should be upheld. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Popular Printing Press, Lahore.—265—272.

APPELLATE SIDE.

No. 94.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

NANAK CHAND AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

BASHESHAR NATH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 195 OF 1903.

Custom—Hindu Law—Succession—Daughter—Daughter's son—Collaterals—Sarsut Brahmans of Gurdaspur City.

Held, that the plaintiffs, on whom the *onus* lay, had proved that in matters of succession the parties to the suit, *Sarsut Brahmans* of Gurdaspur City, were governed by custom and not by Hindu Law, and that according to custom near collaterals of a deceased person exclude daughters and their sons from inheriting the property of the deceased.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 6th February 1903.

Messrs. Ganpat Rai, Advocate, and Pandit Sheo Narain, Pleader, for Appellants.

Mr. Muhammad Shafi, Advocate, for Respondents.

JUDGMENT.

SHAH DIN, J. (10th July 1907).—The facts of this case are stated in sufficient detail in the judgments of the lower Courts, and it is unnecessary to repeat them here.

The suit out of which this appeal has arisen was brought by the plaintiffs, who are collaterals of one *Mahant Jagan Nath*, a *Sarsut Brahman* of *Sawal gôt* of the town of Gurdaspur, for possession of half share of 1,501 *kanals* 12 *marlas* of land left by him, which on his death in February 1899 came into possession of defendant No. 1, Nanak Chand, who claims to be the adopted son of Jagan Nath, and whose alleged adoption was supported during the mutation proceedings consequent on Jagan Nath's death by the latter's widow, *Mussammat Ladhi*. This lady having died, the plaintiffs sued for possession of the land, denying the alleged fact of the adoption of Nanak Chand, and claiming to succeed to the property of Jagan Nath to the exclusion of the defendants. Defendant No. 1 is Jagan Nath's sister's son, and claims as already stated, to have been adopted by the deceased; defendants Nos. 2 and 3 are the widowed daughters of Jagan Nath; defendants Nos. 4 and 5 are sons of defendant No. 3; and defendant No. 6 is the widow of *Mahant Shib Nath*, who was younger brother of Jagan Nath.

In answer to the plaintiffs' claim, Nanak Chand, defendant No. 1, pleaded that he had been adopted by the deceased Jagan Nath twenty-nine years ago, when he was only two months old, and had always been treated by him as his son, and that therefore in his presence the plaintiffs had no right to succeed to Jagan Nath's land. Defendants Nos. 2 to 5 pleaded that Nanak Chand had been adopted by the deceased and was the rightful heir to the property in suit; but that if his adoption was not established the plaintiffs had no *locus standi* to sue in their presence, as in matters of succession the parties were governed by Hindu Law and not by custom.

Upon these pleadings the Court of first instance framed ten issues, covering all the material points which arose in the case, and found that Nanak Chand's alleged adoption was not established, that the suit was within limitation, that the parties were governed by Hindu Law and not by custom, and that the plaintiffs had no *locus standi* to sue in the presence of the deceased's daughters and their sons. It therefore dismissed the suit.

On appeal the learned Divisional Judge agreed with the first Court in holding that the adoption of Nanak Chand was not proved, and that the suit was therefore within limitation; but he held, differing from the first Court, that the parties were governed by ordinary agricultural custom and not by Hindu Law, and that in the matter of succession to the property left by Jagan Nath, his daughters and their sons were excluded by his collaterals, the plaintiffs. He, therefore, decreed the plaintiffs' claim.

The defendants appeal to this Court, and on their behalf it has been contended by *Pandit* Shiv Narain (1) that the adoption of Nanak Chand by Jagan Nath is fully proved, and (2) that the lower Appellate Court is in error in holding that in matters of succession the parties are governed by agricultural custom and not by Hindu Law, and that therefore the plaintiffs are entitled to succeed to Jagan Nath's property to the exclusion of his daughters and their sons, defendants Nos. 2 to 5.

The first contention is, in my opinion, untenable and may be disposed of in a few words. The first Court has discussed elaborately both the oral and the documentary evidence, which the appellant, Nanak Chand, has adduced in support of his alleged adoption, and it has given very cogent reasons for holding that the *factum* of adoption has not been established. No deed of adoption has been produced, nor is it alleged that the late *Mahant* Jagan Nath ever executed any

kind of informal writing which would go to support the theory of adoption. All that is urged is that in his infancy Nanak Chand was brought over by his uncle, Jagan Nath, to his own house, was educated by him, was married at his expense, and was in all respects treated by him as his own son. All this alleged course of treatment, however, was perfectly consistent with Nanak Chand not being appointed an heir by Jagan Nath, as admittedly Nanak Chand had lost his mother when he was an infant, and it was after this event that Jagan Nath, out of natural affection for the helpless orphan, took charge of him and brought him up almost as a member of his own family. There is no credible evidence, however, on the record to show that the late *mahant* ever intended to appoint, or did in fact appoint, the child as his heir or treated him as his adopted son. The lower Appellate Court has, after carefully considering the materials on the record in support of the allegation of adoption, concurred with the first Court in holding the alleged adoption unproved; and after giving the matter my best consideration I am unable to see sufficient reason to differ from the concurrent finding of the Courts below on this point. I would, therefore, overrule the first contention.

The second contention raises the crucial question whether the parties are governed in matters of succession by Hindu Law or by Custom; and as the Courts below have come to divergent conclusions on this point, and the decision of this Court on this part of the case would form a precedent of no small importance in future disputes as to right of succession among *Sarsut Brahmans* of Gurdaspur, the question has been elaborately and most ably argued by *Pandit Sheo Narain* for the appellants and by Mr. Muhammad Shafi for the respondents, and a large number of authorities have been cited and discussed on each side. Without entering upon a detailed consideration of the various points raised in the course of the argument at the bar, some of which it is unnecessary to notice as not being very material to the decision of this appeal, I shall proceed to discuss briefly the salient aspects of the case as presented on both sides relative to the rule of succession which governs the parties in respect of the land in suit.

In a case of disputed succession such as the present to which Section 5 of the Punjab Laws Act applies, we start with the fundamental proposition now too firmly established to be controverted that, except in certain cases where the custom contended for is so universal and has been so often declared to exist by judicial decisions of the highest Appellate

Court in the Province that it may be presumed to exist and to govern a particular case, the person who alleges a custom contrary to some precept of his personal law is *primâ facie* bound to prove that custom; and that if no such custom is proved to exist the personal law of the parties must furnish the rule of decision. See *Mussammat Lorendi v. Mussammat Kishan Kaur*, 149 P. R., 1888; *Mussammat Pal Devi v. Fakir Chand*, 60 P. R., 1895; *Mussammat Fakhar-un-Nissa v. Malik Rahim Bakhsh*, 23 P. R., 1897 (page 105); *Kartar Singh v. Mathar Singh*, 94 P. R., 1898; *Mussammat Fatima v. Arjmand Ali*, 41 P. R., 1901⁽¹⁾; *Sheran v. Mussammat Sharman*, 117 P. R., 1901⁽²⁾; *Wishan Das v. Thakur Das*, 119 P. R., 1901⁽³⁾; *Muhammad Hussain v. Sultan Ali*, 54 P. R., 1903; *Jowala v. Hira Singh*, 55 P. R., 1903⁽⁴⁾, F. B.; (pages 223—224); and *Daya Ram v. Soheli Singh*, 110 P. R., 1906⁽⁵⁾, F. B. The last mentioned Full Bench decision contains the most recent and the most authoritative pronouncement on the subject (see pages 400, 403—405, 408, 410 and 411; and in accordance therewith I accept unreservedly the soundness of the position taken up by the learned pleader for the appellants, namely, that in the present case it is for the plaintiffs to prove affirmatively that in matters of succession as regards the property in suit the parties are governed by custom and not by Hindu Law, and that under the rule of custom applicable to them in this respect, the daughters and their sons are excluded from inheritance by the collaterals of *Mahant Jagan Nath*. I did not understand Mr. Muhammad Shafi to dispute the general correctness of this position; what he on behalf of the respondents strove to impress upon the Court was that, under the circumstances disclosed in the case, the initial burden of proof as to existence of custom at variance with Hindu Law which lay upon the plaintiffs was comparatively light and has been either amply discharged or at least shifted on to the defendants, creating against them a presumption in support of the applicability of custom which they have failed to rebut on the present record.

The ground having been thus cleared by a broad definition of the respective positions of the parties to this appeal, I now proceed to consider whether upon the materials on the record the plaintiffs have succeeded in proving that they, as the collaterals of *Mahant Jagan Nath*, are entitled to inherit the land in suit in preference to the daughters of the latter and their sons, defendants Nos. 2 to 5.

(1). S. C., 49, P. L. R., 1901.

(3). S. C., 6, P. L. R., 1902.

(5). S. C., 31, P. L. R., 1907.

(2). S. C., 182, P. L. R., 1901.

(4). S. C., 117, P. L. R., 1903.

The plaintiffs are *Sarsut Brahmans* of *Sawal gôt*, resident in the town of Gurdaspur, and their family is known as that of *mahants*. Fragmentary notices of this family occur in the *Gazetteer* of the Gurdaspur District for 1891-92 in more than one place as follows:—

Referring to the administrative sub-divisions of *tahsil* Gurdaspur under the Sikhs before annexation, it is stated at page 35:—

“*Gurdaspur*.—Formed part of the Kanhaya estate, The village of “Gurdaspur was held in charitable grant by the *Brahman* priests of “Gurdaspur, who still own the estate.”

At page 63 we find the following paragraph:—

“The *Sarsut Brahmans* of Gurdaspur have an establishment at “that place of which the main feature is a shaking arcade of masonry. “The elder branch of the same family lives at Gurdaspur in the “Pathankot *tahsil*, where there is also a considerable *dharamsala*. Both “of the old *mahants* of Gurdaspur have just died, and the head of the “institution is now Bal Nath.”

At page 170 we read:—

“The Gurdaspur *mahants* have a grant (assignment of land revenue) “of Rs. 984 in Gurdaspur, Hable and Anjla.”

At page 180 there is the following foot-note connected with an extract from Cunningham's History of the Sikhs containing a reference to the construction by the Sikhs of a fort named Gurdaspur:—

“It now contains a monastery of *Sarsut Brahmans*, who have adopted “many of the Sikh modes and tenets.”

The above extracts throw some light on the history and position of the family, and, so far as the statements of fact contained in them are corroborated by the materials on the present record, they have some bearing on the aspect of the case under consideration. The most reliable record (for the purposes of this case) however of the history of the family is that contained in the *shajra nasb* of *mauza* Gurdaspur *khas* prepared at the Settlement of 1865, and which is to the following effect:—

“Originally this village was owned by a tribe of *Jats* of *gôt* Sangi. “Nine generations ago our ancestor, Guriaji, emigrated from *mauza* “Gurdaspur, *ilaqa* Pathankot, and having purchased this village settled “here and gave it its present name. Since then the village has never “been deserted. Three generations after the foundation of the village, “Mahant Saran Das and Mahant Narain Das, after setting apart a por- “tion of the lands as *shamilat*, divided the remainder of the area into

"two equal shares which thenceforward have been known as the two *tarafs* of Mahant Saran Das, Sarkar Kalan and Mahant Narain Das, *Sarkar Khurd*. The *Sarkar Kalan taraf* was at the time of the "Summary Settlement sub-divided into seven shares, out of which one "share was reserved for the *gaddi*, which was taken possession of by "Mahant Badri Nath when he succeeded to the *gaddi****. No sub-divisions have taken place within the *Sarkar Khurd taraf*. The tenure of "the village is, therefore, *pattidari ghair mukammal*."

The above is the substance of the statements of the proprietors (*igrar-i-malkan*) as appended to the *shajra nasab*, so far as it relates to the history of the estate. Towards the conclusion of the statement there is a reference to the proprietors of the *taraf Sarkar Kalan* being *jagirdars* or assignees of land revenue in respect of the lands of their own *taraf*.

It would further appear from a judgment, dated 3rd October 1882, a copy of which is on the file, delivered in a proceeding held under Act XIX of 1841, consequent on the death of *mahant Badri Nath* (of the *Sarkar Kalan* branch of the family), *Mahant Bishambar Nath v. Gorak Nath and Ishwar Nath*, that the elder branch had enjoyed certain *jagir* grants from Sikh times and that the *gaddi-nashins* of the family, though *Brahmans* by caste, had adopted in practice some of the Sikh doctrines and ritualistic observances, their *panth* being that of Guru Nanak, the founder of the Sikh religion. It is also established by the evidence on the record that these Gurdaspur *mahants* keep the *Granth Sahib* in the so-called monastery of which the head of the family, who is the *gaddi-nashin*, is in charge as the head priest, and that special reverence is paid to it by all of them on occasions of marriage and similar ceremonial observances. It was also stated by the plaintiffs who were present in Court that they have discarded the sacred thread, but as this fact was disputed by the other side and as there has been no enquiry into this point in the Courts below, this allegation may be left out of account.

As regards the source of the income of the family, there is hardly any evidence to support the defendants' allegation that a substantial portion of it is derived from the votive offerings said to be made at the so-called monastery and from the fees received from *jajmans* on festive occasions. On the other hand, all the members of the family, appear to depend upon the pursuit of agriculture as their chief source of income,

and though it is true that plaintiff No. 1 was for some time employed in the subordinate clerical establishment of the district, and that plaintiff No. 3 was serving till recently as a Deputy Inspector of Police, the fact of two members of the family having taken to service is insufficient to show that agriculture is not the mainstay of the family. In fact, plaintiff No. 3 is no longer in the Police service, having resigned his appointment, and resumed his ancestral avocation, while plaintiff No. 1 is now a *lambardar* and the sole *saildar* in the Gurdaspur *sail*. Two other members of the family, namely, Prem Nath and Kirpa Nath, are *lambardars* of two villages Anjla and Chahya, respectively. No doubt the plaintiffs and many other members of the family do not till their lands with their own hands, but that circumstance alone does not detract from their status as *bonâ fide* agriculturists, especially when we find from the revenue papers that a fair proportion of the estate is *khud kash* of the family, which shows that cultivation is carried on by the parties through their servants.

The next factor of importance in connection with this part of the case is that the property in suit is ancestral agricultural land situate for the most part within the limits of the revenue *mausa* Gurdaspur and partly within the neighbouring villages. It has been strenuously contended by the learned counsel for the respondents that Gurdaspur is a village and not a town, and that the property in suit being agricultural land and the plaintiffs' family being owners of the entire estate known as *mausa* Gurdaspur, the *Sarsut Brahmins* of this place must be held to be a compact village community presumably governed by ordinary agricultural customs which obtain among the neighbouring dominant agricultural tribes in the district of Gurdaspur. For the purposes of this appeal it is, I think, unnecessary to decide whether, apart from the facts of this case, Gurdaspur is a town or a village, but it is clear from the record that the estate which lies within the boundaries of the revenue *mausa* was purchased many generations ago by the plaintiffs' ancestor Guriaji, who is said to have founded this village, and that this estate has continued to be owned exclusively by this *mahant* family down to the present day. It also appears from the *Gazetteer*, to which reference has been made above, that the town of Gurdaspur is a comparatively small place which contained a population of 5,857 souls, according to the census of 1891, and which was selected as the head-quarters of the district in 1852 on account of its central and elevated position. It is specifically mentioned as having been a village formerly, and as having

grown up to a small thriving town within the last few years. Taking all the circumstances, then, into account, Gurdaspur must be treated, I think, as more or less a village for the purposes of this case; and it would not, therefore, be proper to import into the present dispute considerations which, as bearing upon the determination of the question of the applicability of personal law or custom in a given case, have to be applied to parties who are residents of, and to property which is situated within, a town.

The facts and considerations set out above, when taken collectively, warrant, in my opinion, the conclusion that *Sarsut Brahmans* of Gurdaspur must be treated as agriculturists, and that the *onus* which lies upon the plaintiffs of proving that in matters of inheritance they are governed not by Hindu Law but by custom is, under the circumstances of the case, comparatively light. It now remains to be seen whether that *onus* has been discharged. The plaintiffs, in support of their position rely on the following pieces of evidence:—(1) *Wajib-ul-arz* of *mausa* Gurdaspur prepared at the Settlement of 1852; (2) the *Riwaj-i-am* of *tahsil* Gurdaspur prepared at the Revised Settlement of 1865; (3) the statement of custom as embodied in the English abstract of the Customary Law of the Gurdaspur District prepared at the current Settlement of 1891-92; and (4) instances of exclusion of daughters and their sons by collaterals in matters of succession as deposed to by plaintiffs' witnesses. I shall now proceed to discuss this evidence *seriatim*.

Section 9 of the *Wajib-ul-arz* of 1852 is to the effect that on a proprietor dying sonless, his widow succeeds to his property on a life tenure or until remarriage, and cannot transfer that property except for purposes of necessity (as set out therein), that she is absolutely prohibited from making a sale or a mortgage to the relations of her own parents; and that after the death of the widow the agnates of her husband succeed to the property. This entry in the village administration paper entirely supports the plaintiffs, and the statement of custom, as embodied, therein must be presumed to be correct until the contrary is shown. The criticism levelled against it by the defendants' learned pleader that it is a stereotyped entry such as one finds in all the *Wajib-ul-arzes* throughout the Province, and that the exclusion of daughters by agnates is not specifically mentioned therein, is to my mind devoid of force. The fact that a precisely similar entry is to be found in almost every village *Wajib-ul-arz* goes far to prove the uniformity of agricultural custom in regard to salient features of the Customary Law

of the Province, while the exclusion of the daughters from inheritance irresistibly follows from the rule of succession laid down in the document under consideration.

The *Riwaj-i-am* of 1865 is much more explicit in regard to the exclusion of daughters from inheritance among Brahmans of all *gôts* in the Gurdaspur *tahsil*. Both the parties before us had each a printed copy of the *Riwaj-i-am* prepared for the Gurdaspur District in 1865 and it was freely made use of by each side in argument. I have, therefore, sent for and examined the printed *Riwaj-i am* which supplies valuable information as to the custom prevalent among the *Brahmans* of all the four *tahsils* of the Gurdaspur District. The scope and method of compilation of this record of tribal custom are explained by Mr. (now Sir) L. W. Dane in his preface to the Customary Law of the Gurdaspur District (1893), pages i—iii, from which it would appear that sufficient care and attention were exercised in its preparation, and that “the results of the enquiry were satisfactory and fairly complete. As a copy of the work was given to every *zaildar* and chief headman in the district, the more intelligent agriculturists have a pretty accurate knowledge of what customs were therein recorded regarding their own tribe.” This *Riwaj-i-am* is therefore a comparatively valuable document, and may be treated as a reliable record of tribal customs. Turning now to the tribe of *Brahmans* in the Gurdaspur District, I find that the *Riwaj-i-am* records their customs in all the four *tahsils*, thus showing that they form an important agricultural tribe in the locality, and that care was taken to make a separate record of their customs for each *tahsil*. As has been seen above, the plaintiffs’ ancestors originally came from *mauza* Gurdaspur in the Pathankot *tahsil*, and I have, therefore, compared the record of customs of the *Brahmans* of that *tahsil* with that of the *Brahmans* of *tahsil* Gurdaspur, with the result that, so far as the question of custom under discussion is concerned, both the records are precisely identical. It is the third section of the *Riwaj-i-am* relating to the tribe of *Brahmans* in each *tahsil* which deals with the rights of daughters and their issue. In answer to the question as to the right of a daughter or her issue in the presence of male heirs in case of division of the estate, it is stated that a daughter has no right whatever in the inheritance whether there are male lineal descendants or not; that she and her issue are absolutely excluded from inheritance; and the male collaterals (*rishtad-iran-i-narina*) are the heirs. In a marginal note to this entry it is stated that up to this time no daughter has ever

shared in the inheritance with the male lineal issue, nor has a daughter ever succeeded to her father's estate after his death. This accounts for no definite instances of the exclusion of daughters from their fathers' inheritance being specifically recorded below the entry in question. In the statement of proprietors (*igrar-i-malikan*) appended, as noticed above, to the *shajra nasab* of mauza Gurdaspur prepared in 1865, the following entry occurs "(of partition and the rules relating to the transfer of ownership) whatever rules in regard to these matters are prevalent "our village has been recorded in the *dastur-ul-amal am qaum war*, and we shall act in accordance with them." This *igrar*, which has the same force and effect as a *Wajib-ul-arz*, is signed by Mahant Badri Nath and Mahant Balmik, the then heads of the two branches of the parties' family, the *Sarkar Kalan* and the *Sarkar Khurd*, respectively. The *Riwaj-i-am* of 1865 therefore possesses more than ordinary value in this case, and as the entry in this *Riwaj* which relates to the point at issue appears to be attested by the seal (as was found in the case of 1882 above referred to) of Mahant Badri Nath it greatly fortifies the plaintiffs' position. This *Riwaj-i-am* has, moreover, been noticed with apparent approval in at least two published decisions of this Court, viz., *Nanak v. Bua Ditta*, P. R., 5 of 1893; and *Lehna v. Mussammatt Thakri*, P. R., 32 of 1895, and in my opinion is sufficient, under the circumstances disclosed, to shift the *onus* of proof as to the non-existence of the custom recorded therein on to the defendants.

The English abstract of Customary Law of the Gurdaspur District (1893) at page 18 also contains a record of custom in support of the plaintiffs' claim. In answer to question No. 16, it is stated that if there are near male kindred, daughters and their issue cannot inherit, but are entitled to maintenance until marriage. In a note to this answer, it is stated that probably all descendants of a common grandfather would exclude daughters and their issue, as the daughters' right of inheritance as such is very weak.

The written records of custom then—the *Wajib-ul-arz* of 1852, the *Riwaj-i-am* of 1865, and the Customary Law of the District prepared in 1893—are all uniformly in favour of the view contended for by the plaintiffs that among *Brahmans* of Gurdaspur in matters of succession daughters and their issue are excluded by near agnates of the last male proprietor; and these records are, in my judgment, amply sufficient to relieve the plaintiffs of the initial *onus* placed upon them of proving

that they are governed by the custom which they have alleged to be the basis of their claim.

But the plaintiffs go further, and prove by adducing oral evidence as to definite instances of the exclusion of daughters and their issue from succession among their tribe, that the above records contain a thoroughly correct statement of their custom in this particular, and that their claim is in all respects well founded. None of these instances is of judicial precedent, as admittedly up to the present moment no case of disputed succession as between daughters or their issue and the agnates of a deceased proprietor among *Brahmans* of Gurdaspur has, so far as the parties are aware, been adjudicated in a Court of law. The discussion of these instances need not, therefore, be elaborate, as their value depends entirely upon oral testimony unsupported by revenue records, and they have not been sifted as thoroughly as they might have been on both sides. The plaintiffs produced altogether 36 witnesses (all *Brahmans*) in support of the alleged custom, of whom one is a *zaildar*, 15 are *lambardars* and 20 *biswadars*. Again, of these 36 persons 18 belong to the Gurdaspur *tahsil* and 13 to the Batala *tahsil* and 5 to the Pathankot *tahsil*. These witnesses deposed to twenty-two instances of exclusion of daughters and their issue by collaterals, which occurred in the following 16 villages situate in all the four *tahsils* of Gurdaspur District:—Thanawal, Kalichpur, Ikhlaspur, Bolaki, Ratta, Mir Mal, Chaudhriwala, Jaurasinghwala, Dharmkot, Khera Kotli, Gurdaspur, Taragarh, Sundar Chak, Nalonga and Sohal. Twelve out of these twenty-two instances have been deposed to and verified by the collaterals who actually succeed to the exclusion of daughters, two by a *lambardar* and a *zaildar*, respectively, and the rest by apparently disinterested witnesses, who, however, have not been able to state all the necessary particulars to enable one to judge of the precise value of the precedents cited. Standing by themselves these instances would not probably have carried the plaintiffs' case very far; but considering that these are deposed to simply as evidence corroborative of the written records of custom which have been shown to be reliable; and considering also they cover a comparatively extensive field both as to locality and as to the *gôt* of the parties concerned, I think that these instances have a supplementary value of their own which cannot well be ignored in this case. It is also to be borne in mind that the cross-examination of the witnesses, who have deposed to these instances, has

been, on the whole, of the poorest description and has failed to elicit from them facts such as would nullify the effect of their evidence as to custom. Indeed, the oral testimony of a large number of respectable *Brahman* proprietors in a case like this is in itself a factor not without its value, and its usefulness is enhanced when a fairly good number of uncontested instances of the observance of custom in a definite direction are deposed to by them and are not shown to be mere fabrications. In *Jowala v. Hira Singh*, P. R., 55 of 1903⁽¹⁾, F. B., Mr. Justice Chatterji is reported to have said (page 234): "A rule of custom may be established and held to be of binding force, even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour, or if it is fairly deducible from the analogy of other well-known principles of Customary Law." Again in *Daya Ram v. Sohail Singh*, 110 P. R., 1906⁽²⁾, F. B., the same learned Judge remarks (page 293): "The proof of custom should not be confined merely to judicial precedent and definite instances, but might consist in the elaborate and well considered opinion of the people living under and governed by the custom, and in other recognized modes of establishing its existence."

I might observe in passing that the two instances of the alleged exclusion of daughters in the family of the plaintiffs, which were relied upon by the respondents' counsel in argument, do not appear to me to have been satisfactorily established. Both are said to have occurred in the *Sarkar Kalan* branch of the family. The first instance is that of *Mahant* Badri Nath having succeeded to the estate of his uncle, *Mahant* Ratan Nath to the exclusion of the latter's two daughters. As to this succession, there is a note to Section IV of the *Riwaj-i-am* of 1865 (answer to question No. 16, clause 2) to the effect that Badri Nath was the adopted son of his paternal uncle, which shows that he succeeded to his uncle's estate as his adopted son, and would in that case naturally exclude Ratan Nath's daughters even if the parties were not governed by custom. The second instance is that of Ram Nath, grandson of Badri Nath, having succeeded to the estate of his brother, Bal Nath, to the exclusion of the latter's daughters. It appears, however, from the evidence of Sant Ram, a witness for the plaintiffs, that Bal Nath and Ram Nath were both joint in food and residence, and were therefore

(1) S. C., 117, P. L. R., 1903.

(2) S. C., 31, P. L. R., 1907.

presumably members of a joint Hindu family ; and it is clear that in that case the surviving joint brother would exclude the daughters of the deceased brother from inheritance.

As regards the defendants' oral evidence on the question of custom, I find that they produced altogether 21 witnesses (including defendant No. 1 and plaintiffs Nos. 1 and 2), of whom only 11 are *Brahmans*. Of these eleven witnesses, eight only deposed to custom, and of these eight no less than three, namely, Sri Ram (No. 3), Natha Singh (No. 4) and Kaka Sing (No. 9) state in cross-examination that among their tribe the daughters are excluded from inheritance. Only one of the defendants' witnesses, namely, Balu, deposes to five instances of the daughters having succeeded to their fathers' estates in the presence of collaterals. This witness, however, is not himself a landowner, being only a shop-keeper by profession and is admittedly inimical to the plaintiffs, having been fined in a criminal prosecution brought against him by plaintiff No. 3. Besides, not one of the parties concerned in any one of these five instances has been produced as a witness to verify the same, and it is manifest that mere bald statements made by a witness in Balu's position as to the succession of daughters in positive contravention of the rule of succession as laid down in the records of custom above referred to, cannot be accepted as a correct exposition of custom.

For the foregoing reasons I am clearly of opinion that the plaintiffs have succeeded in proving that in matters of succession the parties are governed by custom and not by Hindu Law, and that according to that custom the plaintiffs as near collaterals of *Mahant Jagan Nath*, exclude his daughters and their sons, defendants Nos. 2 to 5, from inheritance as regards the land in suit.

It now only remains to notice very briefly some of the authorities which have been cited and discussed in argument by the learned gentlemen engaged in the case, though it seems to me that in the view which I have taken of the evidence on the record as to custom, it is probably unnecessary to do so. For the appellants, reliance has been placed chiefly upon *Sham Ram v. Mussammat Hemi Bai*, 73 P. R., 1896, *Harnam Singh v. Devi Chand*, 107 P. R. 1901⁽¹⁾, *Wishan Das v. Thakar Das*, 119 P. R., 1901⁽²⁾, *Mussammat Jamna Devi v. Chuni Lal*, 30 P. R., 1903⁽³⁾, *Atar Singh v. Prem Singh*, 12 P. R., 1906⁽⁴⁾, *Rama Nand v. Surgiani*,

(1) s. c., 117, P. L. R., 1901.

(3) s. c., 85, P. L. R., 1903.

(2) s. c., 6, P. L. R., 1902.

(4) s. c., 108, P. L. R., 1906.

I. L. R., XVI All., 221, (pages 222, 223), and on two unpublished decisions of this Court, *viz.*, *Tara Singh v. Kanshi Ram*, (Further Appeal No. 769 of 1903), and *Hari Singh v. Dial Singh* (Civil Appeal No. 1101 of 1904).

For the respondents the following rulings (among many others which it is needless to notice) were cited. *Prabh Dial v. Devi Dial*, 116 P. R., 1893, *Narsingh Dass v. Ram Lal*, 55 P. R., 1895, *Uttam Singh v. Jhanda Singh*, 21 P. R., 1896, *Faqir Muhammad v. Fusal Muhammad*, 16 P. R., 1906⁽¹⁾, *Gopal Singh v. Sukha Singh*, 58 P. R., 1906, and an unpublished decision of the learned Chief Judge in *Ram Chand and others v. Thakar Das and others* (Civil Appeal No. 816 of 1906).

Now in *Sham Ram v. Mussamat Hemi Bai*, 73 P. R., 1896, the parties were non-agriculturist *Dhal Khatri*s of the Muzaffargarh District, the property in suit was the self-acquired property of the last male holder in a village other than that of his origin, and the collaterals who sought to exclude the daughters were residents of a different village. The provisions of the *Riwaj-i-am* bearing upon the question of custom were so opposed to judicial experience that it was held that no great care was exercised in the preparation of it, and apart from the *Riwaj-i-am* the plaintiffs were found not to have discharged the burden that lay upon them. The case was, therefore, in its essential features, wholly different from the present case and cannot help the defendants.

Harnam Singh v. Devi Chand, 107 P. R., 1901⁽²⁾, was cited to show that the mere fact that some of the land owned by the plaintiffs' family is shown as *khud-kasht* in the revenue papers does not prove that the owners thereof are agriculturists in the sense that they are dependent on agriculture as cultivators, a proposition which is perfectly sound, but which in no way weakens the force of the contention that this fact is at least one factor in the decision of the question whether the plaintiffs are agriculturists or not. And it becomes an important factor when it is shown that the main source of the income of the family is, and has always been, agriculture. The other facts of that case are wholly distinguishable from this case, and the decision on the point of custom is, therefore, not in point.

In *Wishn Das v. Thakar Das*, 119, P. R., 1901⁽³⁾, the parties were non-agricultural *Malhotra Khatri*s of Multan city, and the property in suit was a house situate in Multan. The plaintiff had failed to prove

(1) s. c., 66, P. L. R., 1906.

(3) s. c., 6, P. L. R., 1902.

(2) s. c., 117, P. L. R., 1901.

the existence of a definite custom applicable to the parties at variance with Hindu Law under which, in the presence of daughters of the last male owner, they, as his agnates, succeeded to the house in question; and it was held that the personal law must be applied, and that therefore the daughters excluded the collaterals from inheritance.

In *Mussammatt Jamna Devi v. Chuni Lal*, 30 *P. R.*, 1903⁽¹⁾ the parties were non-agricultural *Tewari Brahmins* of the city of Amritsar who had migrated from Oudh, and the property in suit was a house situate in Amritsar. The instances of the exclusion of daughters by collaterals on which the plaintiff relied in that case were neither numerous nor well ascertained, and it was held by this Court that in the absence of proof of custom the personal law of the parties must be applied. Two rulings of this Court, *Prabh Dial v. Devi Dial*, 116, *P. R.*, 1893 and *Motan Lal v. Devi Das*, 43 *P. R.*, 1899, which were cited for the plaintiffs, were distinguished on the grounds that in those cases the families were *Brahmins* of sects other than *Tewari* and were residing in villages, and that in both cases custom was found to exist; in the latter case the family of the parties being agriculturist. That case is therefore manifestly distinguishable from the present.

Nor does *Atar Singh v. Prem Singh*, 12 *P. R.*, 1906⁽²⁾, help the appellants. There, in a suit the parties to which were *Khatris* of *tahsil Chakwal*, who did not depend entirely on land, but whose family carried on money-lending and other business, it was held that the plaintiffs had failed to prove (the initial *onus* being upon them) that in matters of succession and alienation they followed custom and not Hindu Law. The considerations which influenced the decision of the learned Judge are detailed at pages 46 and 47 of the report, from which it would appear that if it had been shown by evidence that the parties depended upon agriculture as their sole or even principal occupation, the case would have been decided differently.

The decision in *Rama Nand v. Surgiani*, *I. L. R.*, *Al. XVI*, 221 discusses the question of the nature and *quantum* of evidence which, as a general rule, ought to be considered sufficient to establish the existence of a custom at variance with the personal law of the parties; and all we need say in regard to that decision is that the grounds upon which I have arrived at the finding that the parties in this case are governed by custom do not in any way contravene the essential princi-

(1) a. c., 85 *P. L. R.*, 1903.

(2) a. c., 108, *P. L. R.*, 1906.

ple laid down therein as the instances relied on by the plaintiffs are simply corroborative of the written records available as proof of custom and have neither been tendered nor accepted as sole proof of it.

The unpublished decision *Tara Singh v. Kanshi Ram* (No. 769 of 1903) is a case in which the parties were *Aroras* who, although they had invested their savings temporarily in the purchase of land, had at last reverted to their ancestral business of trading and money-lending, and it was found as a fact by this Court that they never cultivated the lands themselves and never became real agriculturists. Lastly, *Hari Singh v. Dial Singh* (Civil Appeal No. 1101 of 1904) was a case of adoption, and it was held that the adoptive father, who was a *pujaree* of the shrine and tank at Tarn Taran, owning some 2 *bighas* of land there, and whose principal income was derived from a share in votive offerings, was not an agriculturist, and as such was not bound by agricultural custom. This decision, surely, cannot be of much help to the appellants in this case.

Of the authorities cited by the learned counsel for the respondents, *Uttam Singh v. Jhanda Singh*, 21 P. R., 1896, *Fuquir Muhammad v. Fuzal Muhammad*, 16 P. R., 1906⁽¹⁾, *Gopal Singh v. Sukha Singh*, 58 P. R., 1906, and the unpublished decision in *Ram Chand v. Thakar Das*, (Civil Appeal No. 816 of 1907) are more or less in point, and go far to strengthen his position. Another ruling which appears to me to be very much in plaintiffs' favour, but which was not cited in argument, is that in *Sayad Rahim Shah v. Sayad Hussain Shah*, P. R., 102 of 1901⁽²⁾, which, at least, so far as regards the bearing of the *Wajib-ul-arz* on the question under discussion, entirely supports the plaintiffs (*see* pages 355, 356, 357, 359, 360).

For the foregoing reasons, I think that the plaintiffs' suit was rightly decreed by the lower Appellate Court, and I would, therefore, dismiss this appeal with costs.

RATTIGAN, J.—(10th July 1907).—The judgment of my learned brother deals so exhaustively with the case before us that I need say no more than that I agree with him in all respects. The appeal is dismissed with costs.

Appeal dismissed.

(1) s. c., 66 P. L. R., 1906.

(2) s. c., 119 P. L. R., 1901.

APPELLATE SIDE.

No. 95.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Kensington.

AMIN CHAND,—(PLAINTIFF),—APPELLANT,

versus

TIRATH RAM,—(DEFENDANT),—RESPONDENT.

CASE NO. 915 OF 1904.

Civil Procedure Code (Act XIV of 1882), Section 13—Res-judicata—Matter directly and substantially in issue—Different causes of action—Custom—Hindu Law—Succession—Daughters—Collaterals—Sarsut Brahmans of Gopalpura village, Amritsar District—Mortgage with possession—Duty of mortgagee to keep account of rents and profits—Interest.

A person suing for possession of land as mortgagee is not required to put forward in the suit his claim to succeed to the property as a reversioner, and his omission to do so does not prejudice his right in any way, as Section 13 of the Civil Procedure Code is not applicable to such cases.

Held, that the parties to the suit, *Sarsut Brahmans* of Gopalpura village of Amritsar District, though owned land for generations, were governed by Hindu Law and not by custom and that daughter's sons excluded near collaterals according to Hindu Law.

In a suit for redemption the Chief Court held that interest and profits realized by the mortgagee balanced each other where the mortgagee had failed to keep accounts of profits realized from the mortgaged property.

Further appeal from the decree of A. E. Hurry, Esqr., Divisional Judge, Amritsar Division, dated the 16th August 1904, affirming the decree of Pandit Janki Parshad, Subordinate Judge, 1st Class, Amritsar, dated the 12th May 1903, dismissing the claim.

Mr. Shelverton, Advocate, and Rai Sahib Lala Sukh Dyal, Pleader, for Appellant.

Bhagat Ishwar Dass, Pleader, for Respondent.

JUDGMENT.

CHATTERJI, J.—(16th March 1906).—The pedigree-table given in the first Court's judgment, page 3 of the printed paper-book,* shows the relationship of the parties to the deceased *Mussammat Prem Kaur*. The other facts are sufficiently detailed in the judgments of the lower Courts and need not all be recapitulated here.

It appears that Amru, defendant's maternal grandfather, and husband of *Mussammat Prem Kaur*, died first, and after him Mansa

* Inserted at the end of this judgment on page 292.

Ram, his first cousin, the husband of *Mussammatt* Bhagwan Devi. The latter event took place twenty-seven years before suit. The *khata* of Amru and Mansa Ram was joint, and on Amru's death *Mussammatt* Prem Kaur succeeded to her share, and on Mansa Ram's, his widow *Mussammatt* Bhagwan Devi, who died in 1893. The present suit was instituted on 29th January 1903.

It was argued before us and was apparently urged in the lower Appellate Court, but not taken in grounds of appeal in that Court, that the plaintiff's right to succeed to the property in suit as the heir of the two widows was *res judicata* under the decree of 8th December 1894 in the previous suit for recovery of possession of part of the disputed land by the respondent, Tirath Ram. In our opinion this contention is untenable. In the first place there was no question then about succession to *Mussammatt* Prem Kaur who was alive. In the next Tirath Ram, suing for possession as mortgagee of the land upon a forcible dispossession by the present plaintiff, was not required to put forward any other title except that of mortgagee. The right of reversion set up by the plaintiff was not put in issue or decided in plaintiff's favour, and the finding that the mortgage was a proper one, Mansa Ram being one of the parties to it, was sufficient to dispose of the suit. It was not, nor could be, a ground of attack on the part of Tirath Ram in that suit to allege his own rights of heirship or want of any such right in the present plaintiff, who had unlawfully dispossessed him. If Tirath Ram did not raise the question when plaintiff put it forward in his defence, he was justified in doing so. The contention of *res judicata* therefore fails. Nor can the defendant's action be treated as tantamount to a binding admission of the plaintiff's right on which he can succeed in his present claim.

The next point for decision is whether the parties are bound by the customary rule of agnatic succession or by Hindu Law. The parties are *Brahmans*, and, though they have owned land for generations, they follow other professions as well, more usually taken up than cultivation of land, by members of their caste. The defendant's witnesses have deposed to instances of succession of daughter's sons in other villages, while plaintiff has not cited a single instance to the contrary in this or in any other village. The rulings cited are not a help in deciding the question, and they are apparently governed by the facts of the cases to which they relate. No general rule about the application of customary law to these

Brahmans can be formulated, and the initial probability that they would follow their personal law is not sufficiently displaced. At all events we are not prepared to overrule the concurrent findings of the lower Courts that the parties follow Hindu Law, not custom. Under that law it is undisputed that Tirath Ram is heir of his maternal grandfather, Amru, and is entitled to succeed to his share of the land.

As regards the share of Mansa Ram, it is admitted by respondent that plaintiff is the preferential heir. The succession of *Mussammatt* Prem Kaur to that share on *Mussammatt* Bhagwan Devi's death was not in accordance with Hindu law, and was probably not sanctioned by custom also. Her possession was wrongful, but did not last twelve years, as *Mussammatt* Bhagwan Devi died in 1893. Thus plaintiff's right is not barred by time, and his acquiescence in her possession for ten years should not deprive him of his right. In fact there was no acquiescence, as he took possession of part of the land and asserted his heirship, but was worsted in the litigation that ensued by Tirath Ram establishing a superior right to possession as mortgagee. Thus, he can only be held to have delayed in suing for redemption for ten years, which is immaterial.

Tirath Ram, having become owner of half the mortgaged land, by right of succession to *Mussammatt* Prem Kaur, the plaintiff is entitled to redeem his half-share on payment of half the mortgage-money.

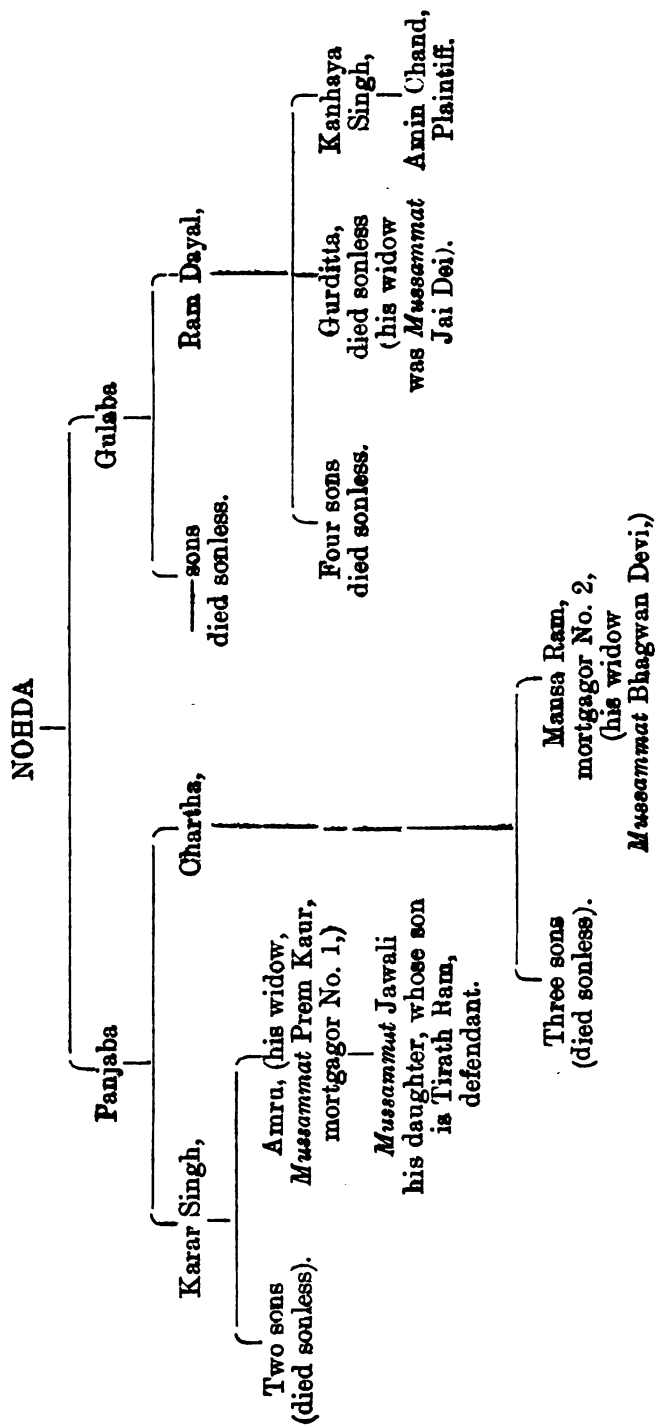
The lower Courts have not decided what the amount due to Tirath Ram on the mortgage is, as they dismissed the plaintiff's claim *in toto*. But, in our opinion, there are sufficient materials for deciding this question. Tirath Ram is not entitled to any rents that he may not have realized from *Mussammatt* Prem Kaur, because that was his own concern, when he let the land to her by a separate lease. As regards interest he was bound to keep an account of it, and of the produce, but has not done so. He cannot therefore complain if the interest and profits of the land are held to balance each other, and we find that this was the case.

We accept the appeal and decree redemption of half the land in plaintiff's favour on payment of Rs. 300 or half the mortgage-money. Under the circumstances of the case we direct that the parties pay their own costs throughout.

Appeal accepted.

PEDIGREE.

The pedigree-table of the parties to the case reported on page 289 is as follows :—



Full Bench.

APPELLATE SIDE.

No. 96.

CIVIL.

*Before Sir William Clark, Kt, Chief Judge, Mr. Justice Chatterji,
C. I. E., and Mr. Justice Shah Din.*

ABDUL GUFAR KHAN,—(DEFENDANT),—APPELLANT,

versus

MUHAMMAD ZIA-UD-DIN,—(PLAINTIFF),—RESPONDENT.

CASE No. 1299 OF 1906.

*Civil Procedure Code (Act XIV of 1882), Section 562—Remand—
Preliminary point—Decision on some of the issues involved in the case.*

Held, by the Full Bench, that the words “preliminary point”, as used in Section 562 of the Civil Procedure Code, mean a point the decision upon which is sufficient for the disposal of the suit. 109 P. R., 1887; 89 P. R., 1891 (F. B.) *overruled*; 43 P. R., 1902; s.c. 35 P. L. R., 1902; 27 P. W. R., 1907; 120 P. R., 1906; s.c. 55 P. L. R. 1907; I. L. R., XVI Mad., 207, XX Mad., 25; XXII Mad., 172; XXVII All., 691; IX All., 30, footnote, 1 Cal., W. N. 340 referred to.

Miscellaneous further appeal from the order of Lala Mul Raj, Divisional Judge, Delhi Division, dated 7th November 1905.

Lala Chuni Lal, Pleader, for Appellant.

Mr. Shah Nawaz, Advocate, for Respondent.

JUDGMENT.

CLARK, C. J.—(27th July, 1907).—This was a suit for pre-emption of a house in *mohalla* Haveli Khan Dura Khan in the city of Delhi. The defendant denied the existence of the custom of pre-emption in the *mohalla*. The first Court found that the custom was not proved to exist and dismissed the suit. On appeal the Divisional Judge found that the custom did exist and remanded the case for retrial under Section 562, Civil Procedure Code.

The defendant has appealed to the Chief Court under Section 588, Civil Procedure Code, from the order of remand, and the question arises whether the remand was competent, or whether the point on which the decree of the first Court was passed, which was reversed by the Divisional Judge, is a preliminary point within the meaning of Section 562, Civil Procedure Code. This has been referred to the Full Bench for decision in consequence of the conflict of opinion in the rulings of this Court.

A great mass of authorities has been cited in the argument, but it is sufficient to refer to the following :—

Khalas v. Kalyan Singh, 109 P.R. 1887, a decision of Sir Meredyth Plowden, sitting singly, in which " preliminary point " in Section 562, Civil Procedure Code, was defined to be a point " collateral to the merits of the case the decision upon which in one way may put an end to the case, and in another way leaves a subsisting case upon the merits." This was before the amendment of the section by Act VII of 1888, by which the words " so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties " after the words " upon a preliminary point," existing in the section as originally framed, were repealed.

In Ghulam Jilani v. Ghulam Haidar Khan, 89 P. R., 1891, F. B., in the judgment of the Division Bench following upon the decision of the Full Bench in the beginning of the report, a decision dismissing a case for pre-emption on the ground that the custom did not exist in the village was held not to be a decision on a preliminary point but one on the merits.

In Miraj-ud-din v. Karim Bakhsh, 43 P. R., 1902⁽¹⁾, the points actually decided by the first Court in suit for rent, viz., whether (1) there was an agreement for rent as contended by plaintiff, and (2) what was due as rent were held not to be preliminary points, but an opinion was expressed that the third issue not decided, viz., whether plaintiffs were owners of the house of which the rent was claimed was the main issue and might be called preliminary.

In Civil Appeal No. 474 of 1905, the view taken by Sir Meredyth Plowden in *Khalas v. Kalyan Singh*, 109 P. R., 1887, was acted on, but the point was not noticed or discussed.

A contrary view to *Khalas v. Kalyan Singh*, 109 P. R., 1887, was taken in *Nawahu Ram v. Relu Mal*, 27 P. W. R., 1907, on the authority of certain rulings of other High Courts.

In Abdulla Beg v. Walaiti Begam, 120 P. R., 1906,⁽²⁾ a remand was made apparently on the same principle as was laid down in the last named judgment, but no reference was made to the question.

Coming now to the opinions of other High Courts it appears that the current of authority in the Madras High Court is clearly in favour

(1) s. c., 35 P. L. R., 1902.

(2) s. c., 55 P. L. R., 1907,

of taking an extended view of a "preliminary point" and not of restricting it to a point collateral to the merits. In *Ramachandra Joishi v. Hazi Kassim*, I. L. R., XVI Mad., 207, at page 210, Mr. Justice Muttusami Ayyar holds "preliminary point" in Section 562 not necessarily to denote some point collateral to the merits but to include one preliminary to a general investigation of the merits. This he thinks is the sense suggested by the context and supported by the amendment mentioned before. Mr. Justice Best took possibly a still more liberal view. In *Kanakammal v. Ranga Chariar*, I. L. R., XX Mad., 25, the point on which the case was originally decided was that plaintiff had no cause of action, and this was reversed on appeal and the case remanded under Section 562, Civil Procedure Code. The High Court upheld the remand following the case last cited. In *Krishnan Chetti v. Muthu Palandi Vacha Manali Tevar*, I. L. R., XXII Mad., 172, a case had been decided in accordance with an award in spite of protest, and the Appellate Court upheld the objection to the award and reversed the decree and remanded the suit for retrial. The High Court cited *Ramachandra Joishi v. Hazi Kassim*, I. L. R., XVI Mad., 207, and followed it. The last two cases do not throw much light on this present discussion as the points involved in them were preliminary points according to all constructions.

The Allahabad Court has taken the same view. Its latest pronouncement on the subject is given in *Mata Din v. Jamna Das* and another, I. L. R., XXVII All., 691. It approves of the extended definition given in the Madras case first cited and also a dictum of Mr. Justice Mahmud in *Sheoamber Singh v. Lallu Singh*, I. L. R., IX All., 30, foot-note, to the effect that "the expression preliminary point used in that Section (562) "is not confined to such legal points only as may be pleaded in bar of "suit, but comprehends all such points as may have prevented the "Court from disposing of the case on the merits whether such points are "pure questions of law or pure questions of fact."

The only Calcutta case to which reference was made in the argument was *Lala Chuni Lal v. Mohiji Singh*, I Cal., W. N., 340, in which a claim for mesne profits having been dismissed by the first Court on the ground that defendant had not been in possession, the latter finding was reversed by the Court of appeal and the case remanded under Section 562, and the High Court held the remand was improper as the case had not been disposed of on a preliminary point.

The expression "preliminary point" is not defined in the Code and the decision of the question referred to the Full Bench is one of considerable difficulty as the learned Judges of the Allahabad High Court remark in *Mata Din's* case. This accounts for the conflict of opinion in this Court and among the other High Courts.

On the whole, however, we think Sir Meredyth Plowden's definition that a point collateral to the merits of the case is meant by the expression, unduly narrows the scope of Section 562. This is specially the case after the amendment introduced by Act VII of 1888, which was subsequent to Sir Meredyth Plowden's ruling. Section 562 speaks of the suit having been *disposed* upon a "preliminary point", and this ought to furnish a guide for interpretation. The only necessary connotation of a preliminary point in the section appears to be that it should suffice for the disposal of the suit. This does not require that it should be a point collateral to the merits or even that it should be a law point. A point of fact may be such that the decision on it would be sufficient to decide the whole suit without going into other questions, *e. g.*, the *factum* of adoption when a plaintiff sues on the strength of an adoption or of a will when a claim is founded on it, or of a partnership when plaintiff asks for an account on the allegation of being a partner. A decision on any of these points adverse to the plaintiff puts an end to the suit without requiring the Court to go into the other questions that arise in the event of their being found in plaintiff's favour. Any point the decision of which *does not enable the Court to decide the suit* is, on the other hand, excluded from the category of a preliminary point. In other words, to use the language of Mr. Justice Muttusami Ayyar, preliminary point refers "to some point either collateral to the merits which precluded their determination altogether, or some particular question which though relating to the merits precluded their general determination." Mr. Justice Mahmud's dictum, though delivered prior to the amendment, lays down substantially the same thing. It is not possible, nor is it necessary, to formulate a more specific definition than that we have indicated above.

We accordingly reply to the question before the Full Bench in these terms.

Case returned to Division Bench.

APPELLATE SIDE.

No. 97.

CIVIL.

Before Mr. Justice Reid.

HUKAM CHAND AND ANOTHER,—(DEFENDANTS)—APPELLANTS,

versus

NIKKA SINGH AND ANOTHER,—(PLAINTIFFS)—RESPONDENTS.

CASE No. 250 OF 1907.

Specific Relief Act (I of 1877), Sections 20, 27 (b)—Specific performance—Sale of immoveable property by registered deed, vendee having notice of a previous agreement to sell made by vendor with another person—Compensation for breach of agreement.

When a person buys immoveable property by a registered conveyance having notice of a previous agreement to sell made by the vendor with another person, the vendee has no right to the property as against that person, and cannot urge in defence to a suit for specific performance of the agreement that his sale deed is registered and that the agreement to sell contains a condition under which the vendor makes himself liable for compensation if possession could not be delivered. *P. R.* 31 of 1897, *I. L. R.*, VI Calcutta 534, *X Calcutta* 710 followed, *P. R.*, Nos. 2 and 90 of 1885 distinguished.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Lahore Division, dated 3rd November 1906.

Mr. Parkar, Advocate for Appellants.

Mr. Dhanraj Shah, Advocate for Respondents.

JUDGMENT.

REID, J.—(3rd May 1907).—The facts are stated in the judgment of the lower Appellate Court and are not contested.

The contention for the defendants-appellants is that *Chunder Kant Roy v. Krishna Sunder Roy*, *I. L. R.*, X Cal., 710, and *Harnandun Singh v. Jawad Ali*, *I. L. R.*, XXVII Cal., 468, relied on by the lower Appellate Court as authority for holding that the registered sale-deed, executed with notice of the prior contract to sell to the plaintiffs-respondents, did not afford a valid defence to the respondents' suit for possession by specific performance of the contract to sell to him, were inapplicable, the contract to sell having been merged in the deed of sale executed in favour of the respondents after the execution of the deed to the appellants.

The contention has, in my opinion, no force. The deed of sale in favour of the respondents was the natural sequel to the contract to sell and the respondents were not in a worse position after than before the execution of the sale-deed. There was no novation within the terms of

Section 62 of the Contract Act, and the merger of the contract to sell in the sale deed does not deprive the respondents of the benefit of the contract. *Akbar v. Prem Singh*, 2 P. R., 1885, cited for the appellants, does not help them. In that case it was held that the defendants did not allege a contract to sell to him, but alleged an actual sale. The present suit is based on a contract to sell, and differs from the class of cases dealt with in *Harnam Das v. Hira*, 90 P. R., 1885, F. B. in which the contest is between registered and unregistered deeds of sale and mortgage. The sale-deed of the respondents in the present case was subsequent to the sale-deed of the appellants, but the contract to sell to them was prior to the appellants' sale-deed, and it has been found that the appellants had notice of it. The cases of *Chunder Kant Roy* and *Hurnandun Singh*, cited above, and *Nemai Charan Dhabul v. Kokil Bag*, I. L. R., VI Cal., 534, are therefore directly in point, and no authority to the contrary has been cited. Illustration (g) to Section 3 of Specific Relief Act is also in point.

The next question for consideration is the effect of the condition in the contract to sell, providing for damages payable by the vendor on failure to convey the property to the vendees. The agreement to sell executed by the defendant-respondent, Ram Das, contained understandings to execute a deed of sale in favour of the plaintiffs-respondents to get it registered, receiving the balance of the purchase-money at the time of registration, to put the plaintiffs-respondents in possession, and, on failure to do so, to pay the plaintiffs-respondents Rs. 75 as damages, and to refund the earnest money, the amount to be recoverable from the person and property of Ram Das. There was no condition that the plaintiff-respondents should abandon their right to specific performance, and there was no understanding by them to accept the Rs. 75 in lieu of their rights as purchasers.

Section 20 of the Specific Relief Act and *Haji Ghulam Muhammad v. Kaka Ram*, 31 P. R., 1897, are opposed to the contention that Ram Das could pay the penalty and decline to convey the subject-matter of the contract. The respondents were entitled to enforce the contract to sell to them, and were not bound to accept the penalty in lieu of possession.

The appeal fails and is dismissed with costs.

Appeal dismissed.

REVISION SIDE.

No. 98.

CIVIL.

*Before Mr. Justice Shah Din.***Mussammat KARTAR DEVI,—(PLAINTIFF)—PETITIONER,***versus***Mussammat SURASTI AND ANOTHER,—(DEFENDANTS)—RESPONDENTS.**

CASE NO. 817 OF 1906.

Jurisdiction—Small cause—Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 18—Suit by heir for recovery of moveable property deposited by owner—Civil Procedure Code (Act XIV of 1882), Section 158—Dismissal for default—Non-service of summonses on witnesses—Procedure.

Held. that a suit by an heir for recovery of moveable property or its price against the defendant with whom the owner had deposited it for safe custody is not excepted from the jurisdiction of the Court of Small Causes. Such a claim does not fall within article 18 of the second schedule of the Provincial Small Cause Courts Act.

Held, that the provisions of Section 158 of the Civil Procedure Code should only be resorted to when no other provisions of the Code are applicable to the case, and they do not permit of summary dismissal of the suit without considering the evidence on record produced by the plaintiff.

Petition for revision of the order of B. Fitzpatrick, Esquire, District Judge, Rawalpindi, dated 20th June 1905.

Lala Hukam Chand, Pleader, for Petitioner.

Mr. Nanak Chand, Advocate, for Respondents.

JUDGMENT.

SHAH DIN, J.—(30th April 1907).—The questions for decision in this case are, (1) whether the District Judge had no jurisdiction to hear the appeal because the suit, as laid, was not a small cause, being excepted from the cognizance of the Small Cause Court under Schedule II to Act IX of 1887, and (2) whether the first Court acted with material irregularity in the exercise of its jurisdiction in having dismissed the suit under Section 158, Civil Procedure Code, because of the non-attendance of the plaintiff's witnesses, without considering the evidence on the record, which the plaintiff had already produced.

As regards the first question, I think, after giving my best consideration to the matter, that the suit was a small cause, and that the District Judge, therefore, had jurisdiction to hear the appeal.

The suit is, as I understand the plaint, by the plaintiff, *Mussammat Kartar Devi*, who claims to be the sole heir of one *Baba Ram Singh*, for Rs. 240, being the value of movable property (consisting of Rs. 200 in cash and jewels worth Rs. 40) which is alleged to have been deposited for safe custody with the defendants by *Baba Ram Singh*, and which the defendants decline to restore to the plaintiff. It is clear, therefore, that the suit, as laid, is one for the recovery of movable property or its value, and *not* one "relating to a trust" within the meaning of Article 18 of the second Schedule to the Provincial Small Cause Courts Act. In Section 3 of Act II of 1882 a "trust" is defined as "an obligation annexed to the ownership of property and arising out of a confidence reposed in, and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner. Sections 5 and 6 of the same Act lay down the conditions essential to the validity of a trust in relation to movable property" and indicate the circumstances under which such a trust is created, one circumstance being the transfer of the trust property to the trustee unless the trust is declared by will or the author of the trust is himself to be the trustee. There is not the remotest indication in the plaint or in the pleadings of the parties that any "trust" such as would even indirectly satisfy the above requirements was created in relation to the movables for recovery of the value of which the present suit has been brought, and the pleader for the petitioner was unable to cite to me a single authority in support of his contention that Article 18 of Schedule II to Act IX of 1887 applied to this case.

I hold therefore that the suit, as laid, was a small cause, and that the appeal lay to the District Judge.

In regard to the second question, I am of opinion that the petitioner's contention must prevail. The order of the Munsif passed under Section 158, Civil Procedure Code, runs as follows :—

"No witness again of plaintiff, not being served, I therefore decide, having waited for more than two months for those witnesses, to proceed under Section 158 and dismiss the suit with costs" The District Judge, on appeal, justified this order by observing that the hearing of the case had been adjourned no less than four times on account of the plaintiff's omission to pay in process fees for summoning witnesses, and also owing to her absence on the date of hearing when the suit was dismissed in default, and then restored to the pending file on

cause for absence being shown. But whatever may have been the plaintiff's *laches* or want of diligence in prosecuting the suit during its earlier stages, it is manifest that she was in no way to blame, nor did she bring herself within the pale of the penal provision of Section 158, Civil Procedure Code, if her witnesses, who, it seems, had been summoned through Court, were not served, and did not therefore attend on the date of hearing. There is nothing in the rather summary judgment of the Munsif to show that any of the conditions precedent to an order being passed under the aforesaid section existed in this case, and I cannot find from the record that time had specially been granted to the plaintiff to cause the attendance of her witnesses or to perform any other act necessary to the further progress of the suit. That being so, the stringent provisions of Section 158 should not have been made use of by the Munsif, for it has been ruled more than once by this Court that it is under very exceptional circumstances, and only when no other provisions of the Code are applicable to a case, that resort should be had to that section (see *Kale Shah v. Shahabal Shah*, 80 P. R., 1899 and *Panna Lall v. Bull*, 30 P. R., 1906⁽¹⁾). Apart from this, the Munsif had no power to dismiss the suit summarily without considering the evidence which the plaintiff had already produced, inasmuch as all that Section 158 empowers a Court to do, under the circumstances specified, is "to proceed to decide the suit forthwith," i. e., to decide the suit upon the materials on the record at the time when the Court elects so to proceed. It appears that no less than four of the plaintiff's witnesses had been examined in Court before the last date of hearing, and yet, because the rest of the plaintiff's witnesses who had been summoned to attend on the said date were not served, the Munsif felt justified in wholly disregarding the evidence which was already upon the record, and in dismissing the suit without even so much as alluding to that evidence. Surely, for a summary procedure of this character there is no warrant in Section 158, Civil Procedure Code, and it cannot be countenanced in any shape or form by this Court.

The result is that I set aside the judgment and decree of the District Judge, which affirmed the decree of the Munsif, and direct the latter to take up the case at the stage it had reached when the order under Section 158, Civil Procedure Code, was passed, and to proceed with it in accordance with law.

The petitioner will get her costs throughout.

Application allowed.

(1) S. C., 82 P. L. R., 1906.

APPELLATE SIDE.

No. 99.

CIVIL.

Before Mr. Justice Rattigan, and Mr. Justice Lal Chand.

ABDUL KARIM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

SAHIB JAN,—(DEFENDANT),—RESPONDENT.

CASE No. 1192 OF 1906.

Specific Relief Act (I of 1877), Section 42—Declaratory suit—Possession of plaintiff—Proof—Custom—Succession—Daughter—Collaterals in the seventh degree—Onus probandi—Chohan Rajputs of Kharwan village, Jagadhri Tahsil, Amballa District.

To a suit for a declaration of title to certain lands it was pleaded that the plaintiffs not being in possession, the suit was barred by section 42 of the Specific Relief Act. Neither party had succeeded on the record to prove possession by affirmative evidence. The lands were held in actual possession by mortgagees and by tenants, and it was not clear whether plaintiff or the defendant had received rents from the tenants. The defendant relied on the mutation entry in her favor, and the plaintiffs on entries in the *girdawari* papers.

Held, that under the circumstances of the case the suit for a declaration was maintainable. *I. L. R., XV Mad, 307 followed.*

There is no authority for the assumption that in the absence of male issue and of a widow the general rule of succession is necessarily that of agnatic succession as against the daughters, however distant in degree the agnate might be and whatever might be the creed and tribe of the parties concerned.

Held, that by custom prevailing among Chohan Rajputs of Kharwan village, Tahsil Jagadhri of Amballa District, daughters of a sonless proprietor have a preferable claim to his estate as against his collaterals in the seventh degree.

First appeal from the decree of Lala Damodar Das, District Judge, Amballa, dated 27th August 1906.

Mr. Oertel, Advocate, for Appellants.

Mr. MacDonald, Pleader, for Respondent.

JUDGMENT.

LAL CHAND, J.—(17th June 1907)—Munir Khan, a Chohan Mussamman Rajput of mauza Kharwan in Jagadhri tahsil of the Ambala District, died about 1888, and was succeeded by his widow, Mussammat Dasondhan, who died recently in February 1905. On her death the estate of Munir Khan was mutated in favour of his married daughter, Sahib Jan, who has been sued by the plaintiffs-appellants for a declaration that they are by custom entitled to succeed to the exclusion of the

defendant. The plaintiffs allege in their plaint that they are collaterals of Munir Khan in the seventh degree and hold possession of part of his estate, which had not been mortgaged by his widow, *Mussammat Dasondban*. The defendant denied that the plaintiffs were related to Munir Khan or were in possession of any part of his estate, and pleaded that, in any case, by custom she was entitled to succeed in preference to the plaintiffs. The District Judge, after enquiry, held that the plaintiffs were Munir Khan's collaterals in the seventh degree, and that the property in dispute was ancestral, but he found that the plaintiffs were not in possession of any part of the estate, and hence were not entitled to sue for a mere declaration, and on the merits of the dispute he held that by custom the defendant was entitled to succeed in preference to the plaintiffs. The suit was accordingly dismissed with costs. The plaintiffs appeal. It is no longer disputed by the defendant that the plaintiffs are related to Munir Khan, as alleged in the plaint, and we are satisfied on the record, though the matter was contested, that the property in dispute is ancestral, as held by the District Judge. But we are unable to agree with his finding that the suit for a mere declaration of title as owners by inheritance is not maintainable in this case. Neither party has succeeded on the record to prove his or her possession by affirmative evidence. The defendant relied on the mutation entry in her favour and the plaintiffs on entries in the *girdawari* papers. The lands are held in actual possession by mortgagees, by occupancy-tenants and by tenants-at-will. The suit was instituted within one year of the mutation proceedings, and it is not at all clear on the record whether plaintiffs or the defendant has received rents from the tenants-at-will. Under the circumstances the authority quoted by the learned counsel for the appellants—*Chinnammal v. Varadarajulu*, *I. L. R.*, *XV Mad.*, 307, seems to be exactly in point, and we hold that the suit for a mere declaration of title was maintainable. On the merits we do not see any good reason for differing from the view taken by the District Judge. It was contended for the appellants that the *onus* lay on the defendant to prove that by custom she was entitled to succeed in preference to the plaintiffs who are agnatic relations of her father, Munir Khan. An unreported judgment in Civil Appeal No. 522 of 1895, which is apparently cited with approval in *Samanda v. Mussammat Nurbi*, 36 *P. R.*, 1905⁽¹⁾, was quoted to support the contention.

(1) *s. c.*, 37 *P. L. R.*, 1905.

Samanda v. Mussammat Nurbi was a case of *Naru Rajputs* of *tahsil* *Thanesar* in the *Karnal District* and the collaterals who claimed in opposition to the daughter of the deceased proprietor, whose property was in dispute were found to be related to him in the fifth degree. This case is therefore not in point. The degree of relationship in the unreported judgment in Civil Appeal No. 522 of 1895 is not given, but apparently the collaterals were very distant relatives, as the village was found to have been founded four hundred years prior to the last Settlement, and the defendants were held to be related to the deceased proprietor, whose property was in dispute, through the founder of the village. It is significant, however, that the defendants there alleged that they were related in the fifth degree, though they were unable to prove their allegations in Court. It was decided that according to the general rule of agnatic succession a daughter can never succeed to ancestral property and that nearest agnates are the heirs. No authority is cited in the judgment to support the rule. It is apparently opposed to paragraph 23 of the "Digest of Customary Law," by Sir William Rattigan, which lays down that a daughter succeeds in default of *near male* collaterals of her father. In remark I, under this paragraph, seventh degree is given as the extreme limit. "Cases are only rarely met with in which a collateral more remotely related is recognised as having a preferential customary right over a daughter. More usually the fifth degree is found to be the customary limit." The view propounded in the judgment in Civil Appeal No. 522 of 1895 is apparently based on the discussion of the subject in "Tribal Law" by Sir Charles Roe, as appears from the following extract from page 62 of the book :—

Section 15. "It is clear that under the general rule of agnatic succession a daughter can never *inherit*. Whatever favour custom may allow to be shown her under the form of the gift a daughter is not and cannot be one of *warisan yak jaddi* or group of agnates, amongst whom the estate of the sonless man is divided on his death, and who control his action during his life. This is the general principle laid down in all the *Riwaj-i-ams* and the Settlement Officers of Ambala and Bannu say, that even if there are no agnates at all, the estate would not pass to or through females, but would pass to the tribe or village community. It is unnecessary to give a list of the answers, in which this principle is laid down, but I will now notice all those in which a different custom is asserted."

Among these are :—

Section 19. 'The descendants of the great-great-grand father are given as the limit of excluding agnates in Ambala generally, but the Settlement Officer's opinion on the point has already been given ;

* * * * *

"Ludhiana by a group of Hindu *Jats*, by the Muhammadan *Jats* and the *Rajputs* of the Ludhiana *tahsil*."

Section 20. "Some limit, not clearly defined and not mentioned in any of the preceding paragraphs is said to exist in the following districts :—Bannu. It is said that the agnate must be near (*karibwa jaddi*), but the Settlement Officer's opinion as to the real custom has been given above."

* * * * *

A reference to the Customary law of Ambala and the Settlement Report of Bannu does not fully bear out the observation that in the absence of agnates females would be excluded from succession by the tribe and the village community. The view, at any rate, is opposed to the decision of this Court passed since the remark was written, *vide Kirpa Ram v. Ude Ram*, 77 P. R., 1896.

It is true, as observed by the learned author of the "Tribal Law," that a daughter has no place in the line of succession. "A daughter is not and cannot be one of the *warisan yak jaddi*." But it appears to have been assumed that, in the absence of male issue and of a widow, the general rule of succession is necessarily that of agnatic succession as against the daughters, however distant in degree the agnate might be and whatever might be the creed and tribe of the parties concerned.

There appears to be no foundation in Customary law for a rule of succession so broadly stated. It is not supported by any judgment of this Court which can be traced, excepting the judgment in No. 522 of 1895, which apparently quotes the rule *verbatim* from the work on tribal law. Further the Codes of Customary Law prepared for different districts and different tribes are full of answers in favour of a daughter in absence of collaterals beyond certain degree. These answers cannot be lightly passed over, and being so numerous cannot be ignored as merely fanciful. They apparently indicate a general consensus of opinion, that, excepting among certain tribes, daughters, as a rule, are not excluded from succession by collaterals, however distant and remote. To say the least the custom certainly varies, and it appears to be alto-

gether unsafe to lay down a general rule of Customary law, regardless of tribe and creed, that daughters are excluded from succession by collaterals, however remote. In Civil Appeal No. 522 of 1895 the daughter was a plaintiff in the case, and it was found that the claim had been instigated by an enemy of the defendants who purchased the greater portion of the land decreed to plaintiff by the first Court for a consideration made up of sums said to have been expended on the litigation.

We are therefore not prepared to assent to the contention in this case that the *onus* lay on the defendant to prove that she was entitled to succeed to her father's property in preference to plaintiffs who are related in the seventh degree to her father.

But assuming that the *onus* lay on the defendant, we agree with the lower Court that the *onus* has been discharged.

According to Customary law of Ambala District the commonly received custom for all tribes of the District, except *Sayyads* and some *Roras*, is to exclude the daughter, wherever collaterals can be traced up to the fifth degree, see Customary Law of the Amballa District, page 18, question 40. This view is amply supported by the answer to question 40 contained in the special volume prepared for Hindu and Muhammadan *Rajputs* of *tahsil* Jagadhri. Moreover, what is most significant is that the said *Riwaj-i-am* is attested by several *lambardars* and *biswadars* of the village in suit, and among the signatories is Arjmand, one of the plaintiffs-appellants. It is still more significant that the rule in favour of succession of daughters in absence of collaterals in the fifth degree was stated by these *Rajputs* just about the time when Munir Khan, whose property is in dispute in this case, died leaving a widow and a married daughter who is defendant-respondent in this appeal.

The answer given, moreover, by the Muhammadan *Rajputs* of Jagadhri *tahsil* in favour of succession of daughters is not an isolated provision. The same answer was given by Muhammadan *Rajputs* of the neighbouring District Ludhiana, as well as by Muhammadan *Rajputs* of Pipli *tahsil*, District Karnal, as quoted in Civil Appeal No. 522 of 1895. And in *Ranjhi Khan v. Mussammat Kamun* 179, P. R., 1889, a case of *Naru Rajputs* of Hoshiarpur District, fourth degree was found after enquiry to be the limit for excluding daughters from succession [by agnatic relations,

It is thus clear that the custom embodied in question 40 of the *Riwaj-i-am* of Muhammadan *Rajputs* of Jagadhri *tahsil* accords fully with the custom of the tribe as recorded in the neighbouring tracts and districts, and in one case *viz.*, *Ranjhi Khan v. Mussammat Kamun* the custom was found to prevail in the tribe after special enquiry directed for the purpose. It is, moreover, nowise an unusual and rare custom. So early as 1867 fifth degree was recognised as the limit of exclusion of daughters by collaterals, *vide Wazeera v. Hakoo*, 31 P. R., 1867, and the rule was followed by the first Court at least in 1872 in a case of Muhammadan *Rajputs* of the District, when succession was disputed by daughters and by collaterals related in the seventh and eighth degree. Moreover, the *Riwaj-i-ams* quoted at pages 63 and 64 of "Tribal Law" abound in instances, where fifth, even fourth degree, is given as the limit of exclusion. The oral evidence adduced in the present case is not of much use or value, as the witnesses were unable to give requisite particulars in the instances quoted by them. But there are two mutation proceedings printed at pages 18—23 of the records, which distinctly support the same view. In one case, dated 11th August 1893, the daughter succeeded along with the first cousin to an equal share, and in the second case she was permitted to succeed to the whole estate with consent of the collaterals. No instance of exclusion of daughters by collaterals related beyond the fifth degree was cited for plaintiffs-appellants. Their counsel referred to Civil Appeal No. 522 of 1895, which has already been noticed, and to *Mussammat Sahabjan v. Karm Bakhsh*, 80 P. R., 1875, and *Rustam Khan v. Mussammat Jio*, 139 P. R., 1892. In the last mentioned case the direct point in issue was a dispute between a *khanadamad* and collaterals. The degree of relationship of the collaterals to the deceased proprietor is not given in the judgment, but it is significant that even in that case the daughter had actually succeeded to the estate so far back as 1857, after dispute with the collaterals, who finally agreed to her succession on a life-estate, *Mussammat Suhabjan v. Karm Bakhsh* 80 P. R., 1875, turned on an interpretation of the term *karabatian* which construed to mean "next heir, male." But this construction is directly opposed to the view taken of the same expression in *Ranjhi Khan v. Mussammat Kamun* 179 P. R., 1889.

There is thus entire dearth of proof and authority on the side of the plaintiffs, and their sole reliance is on an assumed general presumption, that regardless of tribe and creed, agnates, however remote,

exclude daughters from succession to ancestral property. We have already attempted to indicate that this assumption is not based on any authority excepting the unreported judgment in Civil Appeal No. 522 of 1895, which again has merely quoted *verbatim* the remark on page 62 of the work on Tribal Law. The contention is opposed to the rule embodied in paragraph 23 of the "Digest of Customary Law" by Sir William Rattigan. Whatever value or force might otherwise have appertained to the so-called general presumption, it is clear that in the present case the preponderance of proof is wholly on side of the daughter, defendant. Her case is supported by the tribal *Riwaj-i-am* attested by members of the village community, including one of the plaintiffs by two instances of actual succession and by tribal custom stated, or found to prevail in the neighbouring tracts and districts, while there is absolutely no proof in rebuttal on the other side. We therefore hold that the plaintiffs-appellants have failed to prove that they are entitled to succeed in preference to the defendant, and that even if the initial presumption be conceded in their favour, it is of the weakest description and is amply rebutted by proof on the present record. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 100.

CIVIL.

Before Mr. Justice Lal Chand.

SHAIR SINGH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

SIDHU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 918 OF 1907.

Revision—Civil cases—Question of law—Acquiescence—Alienation by sonless proprietor.

Held, that the question of acquiescence in an alienation by a sonless proprietor is a question of law within the meaning of Section 70 (1) (b) of the Punjab Courts Act.

A sonless proprietor made a gift of his land. Excepting some 17 *kanals* the whole of the gifted land was in the possession of a mortgagee from the proprietor. Mutation took place about a year after the transfer, but the proprietor remained in possession of the 17 *kanals* he had held with him and no steps were ever taken by the donee to redeem the mortgage. In 1891 the donor died and the donee took possession of the 17 *kanals* of land. About a year after the death of the donor the reversioners sued to enforce their right to succeed to the land, and con-

tested the gift. It was objected that the reversioners had acquiesced in the gift and their suit did not lie.

Held, that the contention was not valid and no acquiescence was proved.

Further appeal from the order of Captain G. C. Beadon, I. A., Divisional Judge, Hoshiarpur Division, dated the 24th November 1906, reversing that of Lala Pohu Ram, Subordinate Judge, Hoshiarpur, dated the 6th July 1901, decreeing plaintiffs' claim.

Rai Bahadur Bakhshi Sohan Lal, Pleader, for Appellants.

Lala Durga Das, Pleader, for Respondents.

JUDGMENT.

LAL CHAND, J.—(2nd August 1907).—This is the third advent of this case in this Court. The two preliminary stages are reported in *P. R.* No. 56 of 1903⁽¹⁾, and *P. R.* No. 11 of 1907⁽²⁾. The lower Appellate Court has now dismissed the suit on the ground that the reversioners, before sale to Devi Singh, had acquiesced in the gift made by Ram Singh in defendants' favour. The petition filed as an application for revision was admitted as an appeal under Section 70 (b) IV, but at the final hearing the pleader for the respondents objected to the order of admission on the ground that acquiescence was a question of fact and not of law. This contention is, however, directly opposed to the following observations of their Lordships of the Privy Council in *I.L.R.*, XXI All., 496, at page 504, "Their Lordships were bound by, and have accepted as final, the findings of the Subordinate Judge of Aligarh upon the facts from which acquiescence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found, and upon it the judgments of the Appellate Courts are not final." I must therefore reject the objections urged by the respondents' pleader as altogether untenable. On the merits of the question itself I am unable to agree with the learned Divisional Judge that upon the sale to Devi Singh the reversionary heirs had by their conduct acquiesced in the gift here impugned. The gift was effected on 2nd January 1886 and was followed by mutation proceedings finally sanctioned on 27th March 1887. The mutation proceedings, however, were merely nominal so far as they involved a transfer of actual possession. With the exception of 87 *kanals*, which Ram Singh, the donor, held in his own possession, the rest of the property included in the gift, 156 *ghumaos*

(1) s. c., 93 *P. L. R.*, 1903.

(2) s. c., 30 *P. L. R.*, 1907.

about, was possessed by a prior mortgagee named Gokul Chand,. Despite the gift, Ram Singh never parted with possession of 17 *kanals* held by him personally, and donees neither before nor after donor's death ever made any attempt to redeem the prior mortgage. Ram Singh died in 1891 and after his death the donees took actual possession of the 17 *kanals* held personally by Ram Singh. Within one year, however, of his death, his reversionary heirs, Dheru and others, instituted a plaint against the defendants donees for a declaratory decree in respect of the mortgaged land and for possession of 17 *kanals*, the land now in suit. The plaint was on 27th January 1892 returned for amendment, and on plaintiffs' failure to comply with the order, it was rejected by the Court on 8th February 1892. Meanwhile, on 5th February 1892, the plaintiffs' reversioners, executed a registered mortgage of the estate in favour of one *Pundit* Wazir Chand, and, finally, on 4th January 1894, they presumably parted with their interest in the estate by a sale in favour of Babu Devi Singh, who was the original plaintiff in the present case and is now represented by his legal representative as appellant.

There is nothing whatever on these facts to indicate that the reversioner of Ram Singh ever acquiesced in the gift. The gift was evidently of very little import or value during the lifetime of Ram Singh as almost the whole estate was encumbered with a debt which the donees never attempted to repay, and even after his death all that they got possession of was 17 *kanals* of land, and yet, soon after, a suit impugning the gift was instituted by the reversioners. The suit was no doubt dropped and not proceeded with, but not with any desire or intention to accept the gift, as only three days before the date fixed for representation they had mortgaged the property to a third person thereby unmistakeably asserting their own right as heirs and owners. Evidently the suit was dropped for lack of funds. The mortgage executed on 5th February 1892 proved unsuccessful, and, finally, the property was sold to the present appellant, who, in addition to payment of certain considerations to the vendors, undertook to redeem the prior mortgage and to contest the gift depended upon by the defendants respondents.

The only other circumstance alluded to by the learned Divisional Judge to support his finding as to acquiescence, *viz.*, that the reversioners were of somewhat advanced ages and had no children of their own, is of no value. As he himself has pointed out it does not necessarily

follow that because a reversioner is childless he would consent to an alienation to a female relation. To me the circumstance does not appear to render acquiescence probable as held by the learned Divisional Judge. A childless reversioner may wish to have the estate for his own use as much as a reversioner with children for the use of his own posterity. But whatever weight might otherwise be attached to this circumstance, it is wholly neutralized in the present case by the personal conduct of the reversioners who not only objected to the gift by suit soon after the donor's death, but later on took effective steps for encompassing their intention by alienating the property in favour of another person who was able to carry on the contest till its final determination. I therefore hold that the learned Divisional Judge was not justified on these facts in inferring that the reversioner had legally acquiesced in the gift before sale to Devi Singh.

There is no other point now left for decision in the case. I therefore accept the appeal, set aside the decree of the Divisional Judge, and restore the decree passed by the first Court with costs throughout.

Appeal accepted.

REVISION SIDE.

No. 101.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

Mussammat BEGAM BIBI,—(COMPLAINANT),—PETITIONER,

versus

GHULAM MUHAMMAD,—(ACCUSED),—RESPONDENT.

CASE No. 901 OF 1907.

Penal Code (Act XLV of 1860), Section 415—Cheating—Transfer of encumbered property without disclosing encumbrances.

A person transferring encumbered property as unencumbered one may be guilty of cheating, and upon a complaint by the transferee the magistrate ought to record evidence of complainant's witnesses and determine whether there was a dishonest concealment of facts by the accused, knowing that if he stated these facts complainant would not have consented to the transfer in his favour. *I. L. R., XXVII All., 561 not followed.*

Petition under Section 439 of the order of S. S. Harris, Esquire, Additional District Magistrate, Lahore, dated the 12th April 1907, affirming that of Mian Ahmad Kaka Khel, Magistrate, 1st Class, Lahore, dated the 30th October 1906, discharging the accused.

Mr. Fazal Din, Pleader, for Petitioner.

ORDER.

CHATTERJI, J.—(3rd September, 1907).—The accused was summoned and complainant's evidence was apparently present. The Court should, under Section 252, Criminal Procedure Code, have allowed complainant to prove her case. The petition of complainant is inconclusive, but the complainant could show that the accused made a positive statement that the house was not encumbered. The Court could then decide on the evidence whether or not there was any case against the accused.

CLARK, C. J.—(7th December 1907).—In continuation of the Hon'ble Mr. Justice Chatterji's order of 3rd September, 1907, I direct the Magistrate to take complainant's evidence and dispose of the case.

The Allahabad ruling should not be followed blindly. The Magistrate should dispose of the case according to the wording of Section 415, Indian Penal Code, deciding whether there was a dishonest concealment of facts by accused, after considering whether there might not be a dishonest concealment by not stating facts within accused's knowledge, knowing that if he stated those facts complainant would not have bought the house.

Petition allowed.

Full Bench.

APPELLATE SIDE.

No. 102.

CIVIL.

Before Mr. Justice Reid, Mr. Justice Rattigan and Mr. Justice Lal Chand.

BASHESHAR LAL,—(DEFENDANT),—APPELLANT,

versus

BHAI NATHA SINGH,—(PLAINTIFF),—RESPONDENT.

CASE No. 1085 OF 1903.

Civil Procedure Code (Act XIV of 1882), Section 44—Causes of action—Misjoinder of—Limitation Act (XV of 1877), Schedule II, Articles 134, 144—Religious institution—Alienation (mortgage) of trust property by Mahant—Suit by his successor appointed by community competent to elect him against mortgagee and his tenants for possession of property mortgaged and the rent realized by mortgagee.

On the death of a *mahant* of a religious institution the plaintiff was appointed as his successor by a community competent to elect him. The plaintiff brought the present suit for possession of immoveable property belonging to the institution and sought to set aside a mortgage executed by his predecessor. He alleged that defendants Nos. 1 and 2 had wrongfully taken possession of the property in dispute, and that they had obtained for themselves a certain sum of money by letting the said property to some of the other defendants, and claimed to recover the amount.

Held, that the plaintiff's claim was not bad for misjoinder of causes of action for the relief sought was for possession of property and the mesne profits realized.

Held, also, that article 144 and not 134 of the second schedule of the Limitation Act was applicable to the claim, and the suit having been brought within 12 years from the date on which the plaintiff was appointed *mahant* was not barred by limitation. In such cases cause of action arises on the date of appointment of the *mahant*.

That the word, "purchased" in article 134 is not used in the technical sense of the English law, but in the ordinary dictionary sense, and the mortgagee could not be regarded as purchaser of the property.

That the plaintiff, not having succeeded to the property as heir, article 134 was not applicable on this ground also.

First appeal from the decree of the District Judge, Amritsar District, dated 16th November, 1900, decreeing plaintiff's claim.

Mr. Beechey, Advocate, for Appellants.

Bhagat Gobind Das, Pleader, for Respondent.

JUDGMENT.

RATTIGAN, J.—(8th February 1907).—The facts of the case are stated in the order of reference and the only questions upon which we are asked to give an opinion are: (1) whether the suit is barred by limitation, and (2) whether the plaint disclosed causes of action which should not have been joined together. The second question is easily disposed of, and was obviously founded on a misapprehension of the plaint. Plaintiff's allegation is that defendants Nos. 1 and 2 have wrongfully taken possession of the property in dispute and that they have obtained for themselves a sum of Rs. 400 by letting the said property to some of the other defendants. He accordingly prays for a decree for possession of property and for Rs. 400 which the defendants No. 1 and 2 have so realized. In other words, the relief sought for is possession of the property and *mesne* profits realised. This is the clear meaning of the plaint and, so construed, it does not, in any respect, offend against the rule relating to joinder of causes of action.

Upon the first question, Mr. Beechey, for appellants, relied upon the authorities cited in the referring order and upon articles 134 and 144 of the second schedule to the Limitation Act, 1877. Before the Divisional Bench the learned counsel apparently repudiated the applicability of article 134, but he has, in arguing the case before us, relied more on that article than on article 144, and the authorities cited by him deal almost entirely with the construction and proper interpretation of the former article.

The learned counsel's principal authority is the decision of their Lordships of the Privy Council in the case—*Gnanasambanda Pandara v. Velu Pandaram*, I.L.R., XXIII Mad. 271. Mr. Beechey strenuously contended that this case was entirely in point and that it disposed of the question now before us. Of course if the ruling in question had been in point, we should have had no hesitation in accepting it as final and conclusive. But, in our opinion, it is in no way relevant. The alienation in that case which the plaintiff, Velu, sought to impeach had been effected by his father, Natoraja, and in the plaint it was stated that the endowment was founded by the ancestors of the plaintiff and one Chockabinga (whose rights to impeach the alienation had, as their Lordships found, been extinguished long before the suit), "and it was arranged by them that only the members of their family should hereditarily hold the properties which were their family property, and

"from the income thereof conduct the worship and charities connected with the temple." The plaintiff accordingly prayed that his right might be declared to the sole management of the temple, or if he was held not to be entitled to the sole management, that he might be held entitled to it jointly with the defendant. The judgment of their Lordships proceeds:—
 "The contention on behalf of Velu before their Lordships has been, that he does not derive his rights to sue from or through Nataraja, that on his death in 1884 a fresh right accrued to Velu and the period of limitation then began." This contention their Lordships held to be untenable inasmuch as Velu, the plaintiff, could "only be entitled, as heir to his father, Nataraja, and consequently his suit is barred by article 134." In other words, in the case before their Lordships, the plaintiff's rights were derived from his father, the endowment being hereditary in the family, and as the latter's rights were barred, the plaintiff's rights were equally barred. In the present case the plaintiff does not allege that he derives his right to sue from or through the last Mahant. The endowment is not hereditary in a family, and the plaintiff in no sense derives his rights from the last Mahant. He has been appointed Mahant, on the death of the last Mahant, by the Peshawarian community who, according to the finding of the Divisional Bench, are the authority competent to appoint a successor to a deceased Mahant. He is not, therefore, the heir of the deceased in the sense that Velu was the heir of Nataraja.

The decision in *Gnanasambandus's* case is thus not relevant and does not in any way help the appellant. Then, as regards the applicability of article 134 of the Limitation Act, there is, we find, a large array * of authority in favour of the proposition that this article is applicable to cases where the plaintiff seeks to recover possession of "immovable property, conveyed or bequeathed, in trust or mortgaged", and afterwards leased or mortgaged from the trustee or mortgagee, the *ratio decidendi* in these cases being that word "purchased" as used in this article, is used in the sense in which that word is technically understood in English law. With every deference we are unable to accept this view. Assuming in the present case that the property in

* I. L. R., XXIII Cal. 536, 1. Law Journal 546. I. L. R., XXXIII Cal. 511. I. L. R., XX All. 482. I. L. R., XXIV Mad. 471.

suit was "property conveyed or bequeathed in trust," (which is by no means proved), we cannot hold that the mortgage of it by the trustee for the time being constitutes the mortgagee "a purchaser" within the meaning and for the purposes of the article. Words and expressions used in the Limitation Act have to be strictly construed and the word "purchased," in the ordinary acceptation of that term, does not, and cannot, include anything short of an absolute alienation of the title to the property. The framers of the Act were obviously fully alive to the distinction between the various forms of alienation. In article 133, which deals with the similar form of alienation, where the property concerned is moveable, the expression used is "bought," and it is admitted on all hands that the word "purchaser", as used in articles 136, 137 and 138, means a person who actually buys the property outright and not a person to whom the property is merely mortgaged or leased. We are ourselves unable to accept the argument that in one particular article the word "purchase" is used in the technical sense of the English law and that in other articles it is used in its ordinary dictionary sense. As pointed out by Davies J. in his dissenting judgment in *I. L. R., XXIV Mad.*, 471, to hold otherwise, would be to open the door to fraud as well as to render it possible for the perpetration of grave injustice in many cases, (*see also per Aikman, J. in I. L. R., XX All.* 482; *I. L. R., XII Mad.*, 316; *2 Cal. Law Journal Reports* 448; and the judgments of *Rattigan and Barkley, JJ. in No. 124 P. R.*, 1883). We hold, therefore, that article 134 is not applicable to the case of a mortgage effected by a trustee or mortgagee. The next question is whether the present suit is barred under article 144, and the answer to this question depends on whether the present plaintiff's cause of action accrued: (1) at the date of the mortgage, or (2) at the date of the death of the mortgagor, or (3) at the date of plaintiff's appointment as *mahant*. For the reasons given in the referring order, we hold that the cause of action accrued to plaintiff when he was appointed as *mahant*, and that consequently the present suit, which was brought within 12 years of that date, is within time. With this expression of opinion we return the case to the Divisional Bench for disposal of the appeal.

Appeal rejected.

Full Bench.

REVISION SIDE.

No. 103.

CRIMINAL.

*Before Sir William Clark, Kt, Chief Judge, Mr. Justice Chatterji,
C. I. E., and Mr. Justice Rattigan.*

BISHEN SINGH,—(COMPLAINANT),—PETITIONER,

versus

AMRITSARIA,—(ACCUSED),—RESPONDENT.

CASE No. 1464 OF 1906.

*Criminal Procedure Code (Act V of 1898), Sections 195, 439, 476—
Revision—Criminal cases—Sanction to prosecute—Powers of Chief Court
when order of prosecution is passed by Revenue or Civil Court.*

Held, by the Full Bench, that it is competent to the Chief Court to revise under Section 439 of the Criminal Procedure Code an order passed by any Court, Civil, Criminal or Revenue, either under Section 195 or under Section 476 of the Criminal Procedure Code.

Petition for revision under Section 439-195 of Criminal Procedure Code, of the order of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 21st May 1906, reversing the order of Lala Kesho Das, District Judge, Amritsar, dated 9th February 1906, granting sanction to prosecute petitioner under section 195, Criminal Procedure Code.

Mr. Duni Chand, Advocate, for Petitioner.

Mr. Gurcharn Singh, Advocate, for Respondent.

ORDER OF REFERENCE TO DIVISION BENCH.

REID, J.—(1st February, 1907.)—This is an application for interference on the Criminal revisional side of the Court with a sanction for prosecution purporting to have been granted under Section 195 of the Code of Criminal Procedure by a Divisional Judge.

In *Salig Ram versus Ramji Lal, I.L.R., XXVIII All., 554*, a Full Bench held that the High Court has no jurisdiction in the exercise of its revisional powers on the Criminal side to interfere with a sanction by a Civil Court under Section 195 of the Code for prosecution.

This ruling is opposed to the practice of this Court and the point should, in my opinion, be considered by a Division Bench. The application is referred to a Division Bench accordingly. Early date.

ORDER OF REFERENCE TO A FULL BENCH.

RATTIGAN, J.—(2nd March, 1907.)—The facts of this case are briefly as follows :—

One Amritsaria instituted a suit in the Court of the Munsif, 1st Class, Amritsar, for recovery of a sum of Rs. 896-9-0 against four defendants, of whom two were majors and two minors. The Munsif decreed the claim to the extent of Rs. 493-12-0 only, holding that as to the balance the plaintiff's claim was unproved and that the entries relied upon by him in his *bahi* were of suspicious character. The District Judge on the strength of this judgment and holding himself to be the Court of Appellate jurisdiction, granted sanction to the defendants in the above-mentioned suit to prosecute plaintiff for having preferred a false claim in respect of the claim regarding an item of Rs. 300 which the Munsif had held to be false. The Divisional Judge on the application of the plaintiff revoked the sanction thus granted, and the defendants now apply to this Court to revise this latter order. The application is preferred under Section 439 of the Code of Criminal Procedure, and the question whether this Court is competent to interfere with the Divisional Judge's order has been referred by the learned Judge, before whom the application was heard, to a Division Bench for determination. Before proceeding we may observe that the learned Judge has *per incuriam* erroneously remarked that the question is whether this Court on its Criminal revisional side is competent to interfere with a sanction for prosecution purporting to have been *granted* under Section 195 of the Code by a Divisional Judge. The real question is whether this Court can under Section 439 of the Code interfere with an order (no doubt purporting to be under Section 195) made by a Divisional Judge *revoking* a sanction for prosecution. This is a question of considerable difficulty, and we find that the authorities on the subject are conflicting. It seems to be admitted, however, on all hands that orders passed under Section 195 are in no way more open to revision than orders passed under Section 476, and consequently authorities on the question whether orders under the latter section are subject to revision by the High Court under Section 439 are equally relevant to the question whether orders under section 195 are so subject to revision.

But apart from this aspect of the question, there is an entire divergence of opinion, and we think that the question is one of such importance that it should be decided so far as this province is concerned once and for all by a Full Bench. Unquestionably the practice hitherto has been for this Court to interfere under section 439 of the Code whenever it so thought proper with every such order, whether passed by a

Criminal, Civil or Revenue Court (see, for example, 19 *Punjab Law Reporter* 1901). But this Court's power to do so has never been discussed and the right of interference has throughout been assumed to exist.

Obviously, however, if under section 439 of the Criminal Procedure Code, the High Court has no power to interfere with an order passed by a *Criminal Court* under either section 195 or section 476 of that Code, it has still less power to so interfere under the first mentioned section with an order under either of the latter sections passed by a *Civil Court*.

To turn, now, to the authorities. In favour of the contention that the High Court is empowered, as a Court of Criminal revisional jurisdiction, to deal with orders passed under section 195 or section 476, we have the following rulings; viz.

1. *I.L.R., XXXIV Cal.*, at pages 45, 46 :—In this case the learned Judges (Mitra and Ormend, JJ.) were of opinion that section 439 of the Criminal Procedure Code empowered the High Court to deal with all orders under section 476 whether made by a Civil or a Criminal Court.

2. *I. L. R., XXI Mad.*, 124 :—The Full Bench of the Madras High Court have held that the High Court had power (under section 439 of the Code of 1882) to revoke an order made by a subordinate Criminal Court under section 476 of that Code.

The learned Judges relied for their conclusions upon the general terms of section 439.

3. *I. L. R., VI All.*, 1 :—In this case the learned Judges of the Allahabad High Court, (Knox and Aikman, JJ.) held that under section 439 of the Code of 1898 they had power to interfere in the case of a sanction to prosecute given by a Munsif, whose order was upheld by the District Judge on revision. The learned Judges expressly dissented from the ruling in *I. L. R., XXVI Madras*, 139 referred to below.

4. *I. L. R., XXVI All.*, 249 :—In this case Banerji, J. (dissenting from Stanley, C. J. and Blair, J.) held that under section 439 the High Court has power to revise an order made under section 476 of the Code whether such order be made by a Civil or Criminal or Revenue Court.

To a similar effect are the rulings in *I.L.R., XXVI Bom.*, 785; *I.L.R., XVI Cal.*, 730; *I. L. R., XX Cal.*, 349; *I. L. R., XVI All.*, 80.

5. *XI C. W. N.*, 195 :—The High Court of Calcutta held that it was competent under section 439 to interfere with an order under

section 195 by a Munsif, granting sanction to prosecute, the said order having been confirmed by the District Judge.

6. In 19 *P. L. R.*, 1901.—This Court set aside, under section 439, an order by the Divisional Judge which revoked a sanction for prosecution granted by the District Judge. The ground upon which this Court interfered was that the Divisional Judge had no jurisdiction to deal with the case.

The authorities *per contra* are the following :—

1. *I.L.R.*, XXVIII All., 554 F.B. :—The Full Bench held that the High Court has no power under section 439 to interfere with an order passed by a Civil Court either under section 195 or under section 476. They expressed an opinion that such an order might possibly be open to revision under section 622 of the Civil Procedure Code. To a like effect are the rulings in VIII C. W. N. 73 ; *I. L. R.*, XXVI Madras, 139 and X C. W. N., 1026.

2. *I.L.R.*, XXVI Mad., 98 F.B. :—The Full Bench held, overruling *I.L.R.*, XXI Mad., 124 as regards the proper construction of section 476 of the Code of 1898, that when a Court has taken action under section 476, the High Court, as a Court of revision, has no power to interfere under section 439.

3. 7 Bom. L. R., 84 :—The learned Judges held that they had no power to interfere on revision with orders passed under either section 195 or 476, unless the Court had extended its jurisdiction.

4. All. W. N. 1905, page 85.—Burkitt, J. held, approving the ruling in All. W. N., 1903, page 172, and (disapproving the *contra* ruling in All., W. N., 1903, page 170), that the High Court has no power under section 622 of the Civil Procedure Code to interfere with an order of a Civil Court granting sanction under section 195. This ruling we may observe, is not in accord with the opinions expressed in *I. L. R.*, XXVI All., 249 ; VIII C. W. N., 73 ; X C. W. N., 1026 ; and *I. L. R.*, XXVI Mad., 139.

5. *I. L. R.*, XXVI All., 249 :—Stanley, C. J. and Blair, J. held (differing from Banerji, J.) that the High Court has no power under section 439 to revise an order passed by a Civil Court under section 476.

From this brief summary it is apparent that there is a very considerable conflict of authority upon the question now before us, and in view of this conflict we deem it necessary to refer to a Full Bench the question whether it is competent to this Court under any circumstances

to interfere, under section 439 of the Criminal Procedure Code, with an order of a Divisional Judge revoking a sanction to prosecute granted by a District Judge.

The question has been referred to us in this abstract form and it is in the same abstract form that we, in our turn, refer it to the Full Bench. The petitioner, we understand, contends that the Divisional Judge had no jurisdiction to interfere with the order of the District Judge, and also that on the merits the sanction should have been accorded. But with these matters, we consider that we have at present no concern, as the first question is whether this Court has any power under any circumstances to interfere under section 439. If the answer to this question is in the negative, the petition must necessarily be dismissed. If, however, it is to the effect that this Court is competent under certain circumstances to interfere, it will be matter for future consideration whether the particular order now impugned should be upheld or set aside, regard being had to the terms of the answer given to this reference by the Full Bench.

ORDER OF FULL BENCH.

RATTIGAN, J.,—(23rd April 1907).—The question referred to this Full Bench is whether it is competent to the Chief Court to interfere under any circumstances, under Section 439, Criminal Procedure Code, with an order of a Divisional Judge revoking, under Section 195 of the Code, a sanction to prosecute granted by a District Judge.

Practically all the cases bearing on the subject are cited in the order of reference, and it is clear from them that there is a decided conflict of authority as to the powers of a High Court to interfere in such cases. In addition to the said authorities, we may also refer to the following, which are not mentioned in the referring order, viz:—

(1) No. 8 P.R. 1902⁽¹⁾ (Criminal) and No. 97 *Punjab Law Reporter* 1903.—In these cases it was held by a Single Judge that this Court is not competent to revise orders passed under section 195 of the Criminal Procedure Code by a Revenue Court.

(2) *Grija Sankar Roy v. Binode Sheikh* (5 *Cal. Law Journ. : Reps.* 222) :—In this case, Rampini and Mookerjee, JJ. held, distinguishing the case reported at p. 1026 of 10 *Cal. W. N.*, that the High Court was competent to interfere in a case where the District Judge affirmed the sanction granted by a Munsiff.

(3) *A. K. Nur Muhammad v. Ko Aung Gyi*, 12 *Bur. L. R.* 318; 5 *Crim. Law Journal Reps.* 123). Here the Full Bench of the Burma Chief Court dissented from the ruling of the Madras Full Bench in

(1) a. c., 33 P. L. R., 1903.

J. L. R., XXVI *Mad.* 98, and held that the High Court has power under section 439 of the Code to interfere with the action of a Magistrate passed under Section 476 (i) of the Code.

We have carefully considered all the authorities on the subject, and we are free to admit that there is much force in the arguments *pro* and *con*, but after giving due weight to the reasoning of the learned judges who have arrived at a contrary conclusion, we are of opinion that the question referred to us should be answered in the affirmative, and in this opinion we think we are supported by the weight of authority and of argument.

There can be no doubt that it has been the practice of this Court to interfere under Section 439 with orders passed not only by Criminal but also by Civil Courts under Sections 195, 476, and, save for good reasons and unless well satisfied that such practice is erroneous, we do not consider that we should be justified in disturbing it and in holding that this Court has no jurisdiction to exercise power which it has actually exercised as a matter of course and without demurrer for many years past. And there is not only direct authority but also much weight of argument in support of the practice. A Court, be it Civil, Criminal or Revenue, when it acts either under Section 195 or under Section 476, proceeds *ex hypothesi* upon the provisions of the Criminal Procedure Code, and while so proceeding it is *protanto* taking action as (at least) a *qua-i*-Criminal Court. At all events its proceedings are proceedings under the provisions of the Code, and Section 439 provides that "in the case of *any proceeding* the record of which has been called for by itself or *which otherwise comes to its knowledge*, the High Court may in its *discretion exercise*" certain powers. These words are very general, and we fail to see what warrant there is for limiting the expression "*any proceeding*" to certain specified proceedings, especially in view of the fact that these general words are followed by a specific reference to various sections of the Code, and among them to Section 195. Then again, in clause 6 of Section 195, it is provided that in any case a sanction granted by a Court, and by this apparently every description of Court is meant, may by order of the High Court remain in force for a period exceeding 6 months. "High Court" is defined in section 4 (j), and means, in ordinary cases, the highest Court of Criminal Appeal or revision for any local area. As so defined, the Chief Court is unquestionably the High Court for the purposes of clause 6 of section 195, and it has thus undoubtedly power to extend a sanction granted by any Court, Civil, Criminal or Revenue. If it was intended that Civil and

Revenue Courts should be subject respectively to the revisional jurisdiction of the High Court on its Civil side, and the Financial Commissioner in cases falling under section 195, why should this power of extending the period, during which a sanction was to remain in force have been conferred upon the High Court on its Criminal side?

Further section 439 provides in general terms that for the purposes of that sanction the High Court may in its discretion exercise the powers conferred in a Court of appeal by section 195. These words are absolutely unqualified and read in their ordinary signification, they would certainly seem to imply that a High Court can in every case exercise "the powers conferred on a Court of Appeal by section 195." If so the High Court can in a case where sanction has been given or refused by (*e. g.*), a Revenue Court, exercise all the powers which could be exercised by the Revenue Court of Appeal in such a case. The legislature was, of course, fully aware, when framing section 439 of the Code, that in many cases sanction to prosecute would be granted under section 195 by a Revenue Court, and that the appellate authority in such cases would be also a Revenue Court. Knowing this, it has advisedly and in express terms provided that in every case where action is taken by any Court under section 195, the High Court is competent to exercise any of the powers conferred on a Court of Appeal. It is contended that the words "in the case of any proceeding" relate to proceedings mentioned in section 435, but we agree with Banerji J., (*I.L.R.*, XXVI All. 249) that there is no warrant for thus restricting the scope of section 439, which, unlike section 435, does not deal exclusively with the proceedings of Criminal Courts. On the other hand a comparison of the very general words used in section 439 with the restrictive terms of section 435 satisfies us that it was not intended by the Legislature that the scope of section 439 should be as limited as is that of section 435.

There are many other arguments in support of the view which we take, but as they are fully set out in the learned judgment of Banerji, J., in the case above cited, it is unnecessary for us to repeat them. There is, however, one point which is not touched upon by that learned Judge, but which we consider to be of some moment. The grant or refusal of a sanction to prosecute is a question of grave importance to the subject, and from the point of view of public policy it is, we think, important that the action of the Courts should be subject to some check or control in this respect. In many cases this check and control are adequately provided by the provision that an appeal can be preferred to the proper

appellate authority. But if the sanction is granted or refused by the Appellate Court any such check or control would be practically non-existent. It is suggested that the provisions of section 622 of the Civil Procedure Code or section 70 (a) of the Punjab Courts Act could be requisitioned for the purposes of remedying mistakes in such cases. But it is to be remembered that under section 622 of the Civil Procedure Code and section 70 (a) of the said Act, the powers of revision possessed by the High Court are strictly circumscribed and that no such latitude of interference would be permissible thereunder as is allowed under the provisions of section 439 of the Criminal Procedure Code. Moreover, we are very doubtful whether the action of a Court under section 195 or section 476 of the Criminal Procedure Code could be made the subject of revision under the civil revisional powers of the High Court.

We are not unmindful of the arguments in support of the contrary view, and we admit that they have considerable force. But taking everything into consideration, we are ourselves of opinion that it is competent to this Court to interfere under section 439 with an order passed by any Court, Civil, Revenue or Criminal, either under section 195 or under section 476 of the Criminal Procedure Code. The answer therefore that we give to the question referred to us is that it is open to the Chief Court under any circumstances to interfere, if it so thinks proper, with the order of a Divisional Judge revoking a sanction to prosecute granted by a District Judge. The question has been referred in an abstract form and we have consequently nothing to do with the merits of the petition now in question. With this answer we return the case to the Division Bench for disposal of the said petition on the merits.

ORDER OF DIVISION BENCH.

CLARK, C. J.—(17th May 1907).—The law point having been decided there is no object in this case coming before a Division Bench; it should be placed before a Single Judge.

FINAL JUDGMENT OF THE SINGLE BENCH.

CLARK, C. J.—(19th June 1907).—It will save much time if I consider the application for sanction to prosecute Amritsaria for forgery or perjury on its merits without going into the intricacies of the jurisdiction of the District Judge and Sessions Judge to pass their orders respectively.

The original case was decided by Munsif Brij Balab Singh on 19th December 1904: he did not think there was a case against Amritsaria for forgery, but dismissed the suit. Mr. Rennie, Divisional Judge, on 19th April 1905, dismissed Amritsaria's appeal. Then on 19th June 1905 Bishen Singh applied to Mr. Brij Balab Singh's successor for sanction to prosecute: he held that he had no jurisdiction and referred him to Appellate Court.

Then on 9th February 1906 Mr. Kesho Das, District Judge, gave sanction, and Mr. LeRossignol, Divisional Judge, cancelled that order.

I am of opinion that sanction should not have been given in this case, and I cancel the order of Mr. Kesho Das of 9th February 1906.

Petition allowed.

APPELLATE SIDE.

No. 104.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

SUNDAR DAS,—(DEFENDANT),—APPELLANT,

versus

DHANPAT RAI AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 966 OF 1902.

Custom—Pre-emption—Houses—Kucha Gulzari Shah of Lahore City—Purchase money. Withdrawal of, by vendee—Right of appeal not forfeited thereby—Punjab Courts Act (XVIII of 1884), Section 70 (1) (b)—Revision—Civil cases—Findings of fact—Question whether ostensible mortgage is in reality a mortgage.

Held, that a custom of pre-emption in respect of sales of houses was proved to exist in Kucha Gulzari Shah of Lahore City, which is a well recognised subdivision of Lahore City.

A vendee does not forfeit his right of appeal against a decree based on right of pre-emption passed against him by merely withdrawing from Court the purchase money deposited in Court by the pre-emptor.

It is not open to an appellant to question findings of fact arrived at by the lower Appellate Court, when his appeal is heard under section 70 (1) (b) of the Punjab Courts Act.

Whether an ostensible mortgage is really a mortgage or a sale is a question of fact.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Lahore Division, dated 1st November 1902.

Lalas Lajpat Rai and Dwarka Das, Pleaders, for Appellant.

Mr. Shadi Lal, Advocate, for Respondents.

JUDGMENT.

LAL CHAND, J.—(3rd December 1906).—A decree for pre-emption of the house in suit was passed by the first Court in plaintiffs' favour on 17th July 1902. The plaintiff who is respondent in this appeal applied for execution of the decree by delivery of possession on 22nd July 1902, and obtained possession in execution on the 25th July. The defendant, judgment-debtor, appealed against the original decree, but his appeal was dismissed by the Divisional Judge on 1st November 1902. The present revision which has been admitted as an appeal under Section 70 (b) (i) was filed on 11th November 1902, and it appears that on 21st November 1902 the appellant withdrew from Court the purchase money that had been deposited for payment to him

by the plaintiff-respondent. It is contended in the grounds of appeal that the deed of mortgage in question was not intended to be a sale, that *Kucha Gulzari Shah*, where the house in dispute is situate, is a sub-division and not part of *Mohalla Wachhowali*, as held by the lower Courts, and, finally, that a custom of pre-emption is not proved to exist in *Kucha Gulzari Shah* or in *Mohalla Wachhowali*, and that at any rate the plaintiffs have failed to prove that they have a preferential right. A preliminary objection was taken by the counsel for the respondent at the commencement of the hearing that the appellant having already withdrawn the purchase money from Court was debarred from proceeding with his appeal. We overruled this preliminary objection at the hearing as unmaintainable. The statement of facts already given makes it absolutely clear that the money was withdrawn by the appellant subsequent to delivery of possession in execution proceedings and while his appeal was pending in this Court. There is no provision of law in the Civil Procedure Code, which under the circumstances would justify a Court in dismissing the appeal as unmaintainable. According to the Civil Procedure Code, if the appellant fails to appear at the hearing, his appeal must be dismissed for default. If he does appear and proceeds with his appeal it must be heard and decided on its merits unless the appellant express his willingness to withdraw it. There is no provision which would justify a dismissal merely because the appellant in a pre-emption suit has withdrawn the purchase money paid into Court for his benefit. The worst that could be urged against the appellant under the circumstances would be that by withdrawing the purchase money the appellant had acquiesced in the decree passed by the lower Court, and thereby accepted its validity. But this is not a proper and even a fair inference to be drawn, and acquiescence by conduct is not deducible as a legitimate conclusion from the circumstances. The money was paid into Court for the express purpose of payment to the judgment-debtor, and in fact the payment formed a necessary and essential preliminary to the institution of execution proceedings for delivery of possession. The judgment-debtor was compelled by process of Court to part with possession, and if he received its equivalent as a part of the execution proceedings could it be fairly predicated that thereby he voluntarily accepted the decree of Court as final and conclusive, debarring him not from merely filing an appeal, but rendering the appeal already filed as altogether nugatory and abortive. There does not appear to be any legal or equitable ground for entertaining such view. On the other hand it appears to be extremely incongruous

if not ungracious, on the part of the decree-holder to urge the plea. It was the decree-holder who, for his own advantage, started the legal proceedings to compel delivery of possession, and he secured possession by deposit of purchase money for the benefit of the judgment-debtor. It seems, therefore, ridiculous on his part then to urge that the judgment-debtor should be held precluded from proceeding with his appeal because he has received the money deposited for his benefit. It is a pure question of intention in each case, and I am not prepared to hold that receipt of money under such or similar circumstances is conclusive proof that the judgment-debtor thereby intended to abandon his appeal.

In the present case the judgment-debtor received this money several months after parting with possession of property, and in this respect the case is distinguishable from *Feroz-ud-Din v. Ghulam Rasul* (No. 695 of 1905, unpublished), which was quoted for the respondent at the hearing, and where it was found that the appellant had retained the possession of property as well as of the purchase money. But even if it were otherwise, I am unable to see why drawing out purchase money while retaining possession of the property decreed should be treated as equivalent to an acceptance of plaintiff's rights under the decree so as to debar the appellant from prosecuting his appeal. If the judgment-debtor draws out money deposited for his benefit and likewise retains possession, it is open to the decree-holder to compel the judgment-debtor to part with possession. But receiving money without delivering possession has no bearing on the judgment-debtor's right to conduct his appeal which otherwise he is legally entitled to prosecute. The two positions are not entirely incompatible. A judgment-debtor's possession in a pre-emption decree is in reality passive so far as receipt of purchase money is concerned. He cannot execute the decree and compel the pre-emptor to pay in the money if the latter chooses not to pay. On the other hand, he may any moment be called upon to receive the money and part with possession of the property to the pre-emptor. If the judgment-debtor then draws out the money without parting with possession he only anticipates what might take place any moment under legal compulsion. By drawing out the money beforehand he does not forfeit his legal right to appeal against the decree, nor thereby incurs a disability to have his appeal dismissed as if his legal rights were lost. Even if it were held to be inconsistent with his right to maintain the appeal it would only be just to give the appellant an option to select one of the two alternatives. There are obviously no considerations of estoppel applicable to the case, and it is inconceivable what legal

ground can prevail or apply to lead to so fatal a result. The principle laid down in *Bawa Lehna Singh v. Jagan Nath*, 138 P. R., 1888 does not appear to be applicable. It was a converse case and an instance of forfeiture of his right before suit by a pre-emptor. Moreover it was found in that case that the pre-emptor *without retraction* of his right had *demand*ed the mortgage debt from the vendee which was treated as necessarily affirming by implication that the sale was valid. The only other case *Mahomed Khan v. Fida Mahomed* (82 P. R., 1868), with a possible bearing on the question at issue as against appellant has recently been overruled by a Full Bench decision in *Raghu Mal v. Bandu* (31 P. R., 1907 '1)). There existed, therefore, no grounds, equitable or legal, for accepting the preliminary objection, which, as already noted, was accordingly disallowed at the hearing.

I have already set out the gist of the grounds of appeal filed by the appellant. This is an appeal admitted under Section 70 (b) (i), and it is obvious that the appellant is not entitled to question the validity or soundness of the findings of facts given by the lower Appellate Court. He is, therefore, not entitled to argue that the transaction sued upon is a mortgage and not a sale, and that *Kucha Gulzari Shah*, where the property is situate, is a sub-division of the town of Lahore and is not a part of *Mohalla Wachhowali* which is found to be a recognised sub-division. We accordingly restricted the argument in appeal to the sole question whether a custom of pre-emption by vicinage was proved to exist in *Mohalla Wachhowali*. The pleader for appellant admitted that it was a pure question of fact whether *Kucha Gulzari Shah* was a sub-division or formed part of *Mohalla Wachhowali*, but he contended that the question whether the transaction in suit was a sale or a mortgage was a question of law as it depended on an interpretation of the terms of the deed in suit. If the question were whether according to its true interpretation, the transaction represented by the deed was a sale or a mortgage, it would be a question of construction of the deed and hence a question of law. But the question raised by the plaint and found against appellant by the lower Courts is not that the document executed by the defendant-mortgagor is a sale-deed, but that the real transaction entered into by the defendant parties was intended to be a sale and not a mortgage. To prove this assertion the terms of the deed were referred to as relevant evidence, but no question was raised as regards the proper interpretation of these terms which are plain and involve no ambiguity or difficulty requiring any legal construc-

tion. The question raised and decided, therefore, is a question of fact and it did not necessarily and entirely depend upon the terms of the mortgage-deed or their interpretation. The same view was taken in *Budha Mal v. Gulab* (36 P. R., 1899), and another unreported case No. 163 of 1896, which is referred to in it. The matter was not discussed in *Tikaya Ram v. Dharam Chand* (45 P. R., 1895), which was quoted to the contrary, and we see no good reason to follow it.

Moreover the correctness of this view held in that case was subsequently doubted by one of the Judges constituting the Division Bench as explained in *Budha Mal v. Gulab* (36 P. R., 1899). We, therefore, held at the hearing that the appellant was not entitled to argue whether the transaction in suit was a mortgage and not a sale, and restricted his argument to the question of local custom. It is necessary to refer to the following facts as having a direct bearing on this question. The house in dispute is situate in *Kucha Gulzari Shah* which is found to be a part of *Mohalla Wachhowali*, a well recognised sub-division of the city of Lahore. The plaintiffs' house adjoins the house in suit along side, with windows opening on it, but with its door towards the back. The defendant also owns a house and resides in the *Mohalla*, but his house does not adjoin the house in suit, and is a long way from it. According to the pleas it was asserted that *Kucha Gulzari Shah* was itself a sub-division, but this plea has been overruled by the lower Courts, and the simple point for consideration now is whether plaintiff has succeeded in proving a custom of pre-emption by vicinage in *Mohalla Wachhowali* inside which the house in dispute is found to be situate. The lower Appellate Court has referred to the following six cases as proving the custom :—

1. *Sant v. Kishan Chand*.—This case was decided in 1876, and was about a house in *Kucha Mehtian*, Guzar Wachhowali, and a decree was given. The house is the one coloured green and marked B on the plan now put in. It has an entrance from *Kucha Gulzari Shah*, but the main entrance is said to be on the other side in *Kucha Mehtian*.

2. Case of *Bishambar Das v. Bishambar Das and Narpat*. This was for a house in *Shisha Moti Mohalla Wachhowali*, and was decided on 27th April 1889. It was held that the custom of pre-emption existed in Wachhowali. This is not shown on the plan.

3. The case of *Shibdiat v. Sadig Ali Shah*, decided on 31st August 1895.

The house was situated in *Kucha Maddi Shah*, Wachhowali. It was held that the *Kucha* was not a sub-division but that it formed part of the sub-division of Wachhowali where the custom of pre-emption prevailed.

4. Case of *Ram Sahai v. Ghanna and others*, decided on 21st December 1897. It was held that the custom prevailed in Wachhowali.

5. Case of *Mohan Lal v. Dina Nath*. This case was in regard to a house in *Kucha Tillian*, Wachhowali, and was decided by arbitration.

6. Case of *Rai Bahadur Prem Nath v. Jiwra*, decided on the 4th October 1901, and in the Divisional Court on 20th February 1902. It was held that the custom prevailed in Wachhowali. This house is shown in the plan, and is situated in a *Kucha* just beyond that of Gulzari Shah.

The only case cited to the contrary was *Ram Mal v. Salig Ram*, decided on 25th April 1898, relating to a house in *Kucha Sitla Mata, Mohalla Wachhowali*. This case, however, does not support the defendant's contention, but rather supports the view that custom of pre-emption by vicinage does prevail in the *Mohalla*. It was held by the Court that custom of pre-emption does prevail in Mohalla Wachhowali, but that plaintiff who owned an opposite house was unable to prove that by custom he had a superior right against defendant-vendor who also owned a house opposite the back of the house in suit. The pleader for appellant was unable to say that the instances quoted by the lower Appellate Court did not prove the existence of custom of pre-emption by vicinage in *Mohalla Wachhowali* or that the particulars given by the Divisional Judge in each instance were not correctly stated. He, however, argued that it was not proved that a person owning an adjoining house had by custom a right superior to a resident in the *Mohalla*. He was unable to say that in the six instances the vendees were not residents in the *kucha* or were strangers. As a matter of fact in the sixth instance the facts were even much stronger than in the present case. The defendant vendee owned a house opposite the house sold, while plaintiffs' house actually adjoined it, and it was held that according to custom as found in *Mohalla Wachhowali*, the owner of the adjoining house had the right of pre-emption and not the vendee whose house was situate opposite the house sold. This is an instance exactly in point, and leaves no room for doubt that by custom plaintiff is entitled to pre-empt as held concurrently by the lower Courts. The pleader for appellant referred in argument to certain cases where by local custom a person owning a house on the back was not held entitled to pre-empt, but these cases are not applicable to the circumstances of the present suit. The plaintiff having proved the existence of a custom of pre-emption by vicinage is entitled to

succeed as owning an adjoining house against a person whose house does not adjoin. The circumstance that the defendant also owns a house in the *Kucha* a long way from the house in dispute has no bearing on the validity of the plaintiffs' claim. It would be for the defendant to prove, as he alleges, that residence or owning a house in the *Mohalla* not adjoining the house sold is a necessary incidence or ingredient of local custom. By Section 11, Punjab Laws Act, the plaintiff must show the circumstances under which by local custom he is entitled to exercise the right of pre-emption. And he proves that by local custom a person owning an adjoining house is entitled to pre-empt against a person whose house does not adjoin. But it is not further necessary for him to prove that mere residence and owning property in the *Mohalla* not adjoining the house sold also forms a necessary element for determining local custom. If the defendant relies on any such incidence as relevant or having a bearing on the question of custom the *onus* is on him to prove it, the plaintiffs' case on basis of vicinage being complete without it.

There is not even the slightest pretence for alleging that defendant has discharged the *onus* which lay on him or has succeeded in showing that owning property in the *Mohalla* unconnected with the house sold gives an equal right of pre-emption. We, therefore, concur with the lower Courts in decreeing plaintiffs' suit, and dismiss the appeal with costs.

Appeal dismissed.

REVISION SIDE.

No. 103.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

THE MUNICIPAL COMMITTEE OF } —(DEFENDANT),—PETITIONER,
DELHI.

versus

DEVI SAHAI,—(PLAINTIFF)—RESPONDENT.

CASE No. 1569 OF 1905.

Punjab Municipal Act (XX of 1891), Sections 92, 95—Municipality—Sanction to erect building—Encroachment on public street.

Section 92 of the Punjab Municipal Act, 1891, applies primarily to the erection of buildings upon private property. An implied sanction from six weeks of inaction can only affect matters within the purview of section 92 of the Act and does not allow an encroachment or projection upon public street without written permission of the Municipality under section 95. In case of any such encroach-

ment or projection without written permission the Municipality may order demolition of structure on the street, and is not required to proceed by regular suit.

Petition for revision of the order of W. A. LeRossignol, Esquire, Additional Divisional Judge, Delhi dated 22nd February 1905.

Mr. Shadi Lal, Advocate, for Petitioner.

Lala Chuni Lal, Pleader, for Respondent.

JUDGMENT.

ROBERTSON, J.—(20th December 1906).—We think that we must set aside the order of the learned Divisional Judge on revision for the following reasons :—

It appears that defendant applied for permission to the Municipal Committee of Delhi to build a house on a certain plan on land which he alleges to be his own. The only reply he got was a notice, dated 4th March 1903, to the effect, that the Committee would consider the application. He accordingly proceeded, without waiting further, to build and on 13th May 1905 the Committee issued a notice to him under Section 95 of the Municipal Act calling upon him to remove a "taj" and "katwar" and to clear encroachments off from 38 yards of roadway "Zaminrasta" over which his buildings projected.

The plaintiff thereupon brought a suit for an injunction to restrain the Committee from interfering with his house.

The first Court has found on the facts that the plaintiff has encroached upon land of the Committee used as a public passage.

The lower Appellate Court, without coming to any finding on the facts, has held that inasmuch as sanction to build was applied for under Section 92, and no notice of the application was taken by the Committee under Section 92 to forbid the erection of the building, no action can now be taken against the builder under Section 95, and the only remedy of the Municipal Committee is by way of regular suit.

Now Section 92 clearly applies primarily to the erection of buildings upon the private property of the appellant, and a totally different set of considerations apply to sanction in such cases from those which apply to sanction to build in a manner to lead to obstruction to, or to encroach upon, public streets. Section 92 has to be complied with in any case, but a sanction, or an implied sanction from 6 weeks of inaction, can only affect matters within the purview of Section 92; and implied sanction or sanction by silence under Section 92 can be no answer in respect of buildings of the special kind dealt with under section 95, and which cannot be constructed under Section 95 without the

written permission of the Committee. If a man applies for sanction under Section 92 for the construction of a building which includes a projection, as part of a larger building, the building of such projection requiring permission in writing under Section 95 he cannot, we think, shelter himself under sanction by silence under Section 92, against action under section 95. Under Section 95 certain things can only be done with written permission, the fact that certain other things may be done under tacit sanction under Section 92 cannot extend such a tacit sanction to cover acts requiring written sanction under Section 95 merely because the sanction is applied for to do both things at one and the same time. All that tacit sanction under Section 92 can do is to sanction acts not requiring written sanction under Section 95. Several rulings have been quoted, *viz.*, *Ibrahim v. The Municipal Committee of Lahore*, 52 P. R., 1900 ⁽¹⁾; *Aya Ram v. Queen-Empress*, 9 P. R., 1901 (Cr.); *Damodar Das v. Municipal Committee, Delhi*, 27 P. R., 1901 ⁽²⁾; *King-Emperor of India v. Billu Mal*, 27 P. R., 1904 (Cr.); and *Ali Mardan v. The Municipal Committee of Kohat*, 45 P. R., 1905; ⁽³⁾ which we have examined, but the only ruling quoted to us which expresses any view at all in conflict with that expressed above is *Aya Ram v. Queen-Empress*, 9 P. R., 1901 (Cr.) The question was not fully gone into in that case, and was considered from the point of view of criminal liability only. We are, however, unable to accept the view said to be therein suggested that because application to do acts requiring sanction under Section 95 are included in an application to do acts which do not require such a special form of sanction, that, therefore, a tacit sanction which covers the latter, also covers the former. Nor can we accept the view that Section 95 does not apply to encroachments and obstructions which are attached to new buildings, but only to those which are added to old ones. We see nothing in the wording of the section to warrant this interpretation of it, and it is obvious that the value of it for the protection of public streets would be largely diminished by any such interpretation. If the building now in question does in fact encroach upon a public street, that encroachment is not covered by any tacit permission to build under Section 92, for written permission is required by Section 95 and that has not been given. An encroachment upon Municipal property not being a street or drain, sewer or aqueduct, would not come within the purview of Section 95 (*Ali Mardan v. The Municipal Committee of Kohat*, 45 P. R., 1905 ⁽³⁾).

(1) S.O., P. L. R., 1900, p. 395.

(2) S.C., P. L. R., 1900, p. 396.

(3) S.O., 50 P. L. R., 1905.

If the building is entirely within the bounds of the plaintiff's own land, then we hold that Section 92 would apply and that tacit permission would cover the case, but not so if portions of the building are such as to require written sanction under Section 95.

We accordingly accept the appeal, set aside the judgment and decree of the learned Divisional Judge, and remand the case to him for rehearing and disposal according to law, after finding whether as a matter of fact the plaintiff has added to, or placed against or in front of, any building, any projection or structure overhanging, projecting into, or encroaching on any street, or into or on any drain, sewer or aqueduct therein.

If he has not, then Section 92 applies and tacit consent will cover the case. If he has, Section 95 would apply and tacit consent under Section 92 would not cover the case. The remand is under Section 562. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal allowed.

APPELLATE SIDE.

No. 106.

CIVIL.

Before Mr. Justice Reid.

NIADAR MAL,—(DEFENDANT),—APPELLANT,

versus

MUKH RAM,—(PLAINTIFF)—RESPONDENT.

CASE No. 163 OF 1907.

Pre-emption Act (II of 1905, Local), Section 22—Purchase money—Market value—Good faith.

Held, that a person who, in his anxiety to purchase a particular plot of land or to purchase land in a particular village, gives a fancy price is acting in "good faith" within the terms of Section 22 of the Pre-emption Act, II of 1905, although his intention is to render it practically impossible for any one with a superior right of pre-emption to oust him.

Held, also, that an owner is not deprived by the Pre-emption Act of the privilege of selling for the highest price offered. 75 P. R., 1901; s. c., 123, P. L. R., 1901, *referred to*.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated 15th November 1906.

Mr. Taj-ud-din, Pleader, for Appellant.

Mr. Gurcharn Singh, Advocate, for Respondent.

JUDGMENT.

REID, J.—(8th May, 1907).—The Lower Appellate Court has found that the land in suit sold, according to the registered sale-deed, for Rs. 380, paid in the presence of the Registrar, was worth only Rs. 250, and has held that it is difficult to believe that the price was fixed in good faith and that the only inference is that “the payment at registration was a sham.” The Court did not rely on any direct evidence that any part of the money paid at registration was refunded, and an argument used by counsel for the respondent, that the appellant, having been twice defeated by pre-emptors in attempts to obtain a footing in the village, was prepared to go to any lengths to defeat pre-emptors, cuts both ways. It is quite possible that the appellant paid a fancy price in his anxiety to buy the land in suit.

The presumption against good faith is not, in my opinion, sufficiently strong to warrant the inference drawn by the Lower Appellate Court. A person who, in his anxiety to purchase a particular plot of land or to purchase land in a particular village, gives a fancy price is, in my opinion, acting in “good faith” within the terms of Section 22 of the Pre-emption Act, II of 1905, although his intention is to render it practically impossible for any one with a superior right of pre-emption to oust him.

An owner is not deprived by the Pre-emption Act of the privilege of selling for the highest price offered. *Pannan Mal v. Kemn*, 75 P. R., 1901,⁽¹⁾ is in point. Landowners in this Province are sufficiently hampered in their dealings with their property without the addition of the rule that they may not sell for more than the market value of such price as persons with rights of pre-emption are willing to pay.

A preliminary objection, that no appeal lay, the sum involved in this appeal being less than Rs. 250, was overruled, the terms of Section 40 (1) (b, i) of the Courts Act, as interpreted by *Ghulam Ghans v. Nabi Bakhsh* 24 P. R., 1903, F. B. (2) ; being opposed to the objection, the Lower Appellate Court having fixed the market value at Rs. 250 and its decree consequently involving a question respecting property of that value.

I decree the appeal and raise the price to be paid by the plaintiff-pre-emptor to Rs. 380 (three hundred and eighty).

(1) S. C., 123 P. L. R., 1901.

(2) S. C., 35 P. L. R., 1903, F. B.

The unpaid balance will be paid into the Court of the Munsif of Jhajjar on or before the 22nd May. In default of payment within the period fixed the suit will stand dismissed.

The plaintiff-pre-emptor will pay the costs of Niadar, defendant-vendee, of all Courts.

Appeal allowed.

APPELLATE SIDE.

No. 107.

CIVIL.

Before Sir William Clark, Kt. Chief Judge, and Mr. Justice Reid.

SAHIBZADA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

JOWAYA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 218 of 1906.

Punjab Tenancy Act (XVI of 1887), Sections 8, 59—Act III of 1893 Section 4—Statement of conditions of Grant of land on Chenab Canal Colony—Occupancy rights—Succession.

Held that there is no reason to hold that the use of the words "heirs and legal representatives" in clause 21 of the statement of the conditions on which Government is willing to grant to a tenant of the peasant class lands situate on the Chenab Canal under Section 4, Act III of 1893, is not limited by Section 59 of the Tenancy Act. Section 8 of that Act contemplates the creation of occupancy rights by means other than those provided by Sections 5 and 6 of the Act, and tenancies created by Act III of 1893 are governed by the rules contained in the Tenancy Act.

Further appeal from the decree of Munshi Inam Ali, Divisional Judge, Shakpur Division, dated 19th December 1904.

Mr. Shelverton, Advocate, for Appellants.

Mr. Morrison, Advocate, for Respondents.

JUDGMENT.

REID, J.—(12th July, 1906).—The plaintiff-appellants sued for possession of one-third of two squares granted under Act III of 1893 to Gauhar and his sons, on the ground that they were related to the grantees equally with the defendant-respondents to whom the land in suit had been trans-

ferred by the Colonisation Officer, on the marriage of a daughter of Gauhar, in possession until her marriage. The Court of first instance dismissed the suit, holding that the proviso to Section 59 (1) of the Tenancy Act limiting the succession to an occupancy tenant to male collaterals of a common ancestor who occupied the land, applied to grants under Act III of 1893.

Clause 15 of the statement of conditions on which Government is willing to grant to a tenant of the peasant class lands situate on the Chenab Canal, issued under Section 4 of the Act of 1893, provides for exemption from personal residence where the tenancy has devolved upon the heirs or legal representatives of the original tenant.

Clause 21 provides that in every part of the statement the term "the tenant" shall be deemed to include the tenant, his heirs and legal representatives.

Clause 3 provides that all tenancies granted on the conditions set forth in the statement shall, subject to the provisions of clause 18, be for 20 years from the date entered in the register maintained under the Act.

Clause 18 provides that on the expiry of five years from the date entered in that register a tenant, who has paid all sums due to Government, and has observed all the stipulations contained in the statement of conditions, shall be entitled to receive from Government a *sansad* giving him a right of occupancy, subject for ever to all the provisions and stipulations contained in the statement, except clauses and 9.

No reference is made to occupancy rights under the Tenancy Act, and Section 7, Act III, 1893 excludes from the operation of the former Act effect of signature of entry in the register.

Section 59 (1) of the Tenancy Act begins "When a tenant having "a right of occupancy in any land dies, the right shall devolve," &c. Section 8 of the Act provides for establishment of occupancy rights on grounds other than those contained in Sections 5 and 6.

I am inclined to concur with the Courts below in their application of Section 59 (1) of the Tenancy Act to occupancy rights acquired under the statement of conditions issued under Section 4, Act III, 1893, but inasmuch as the point is novel and not covered by authority, I refer it to a Division Bench of which I am a member.

The judgment of the Division Bench was delivered by

Reid, J.—(4th December 1906.)—The order referring this appeal to a Division Bench will be read with this.

We see no reason for holding that the use of the words "heirs and legal representatives" in clause 21 of the statement of the conditions on which Government is willing to grant to a tenant of the peasant class lands situate on the Chenab Canal under Section 4, Act III of 1893, is not limited by Section 59 of the Tenancy Act. Section 8 of that Act contemplates the creation of occupancy rights by means other than those provided by Sections 5 and 6 of the Act, and tenancies created by Act III of 1893 are, in our opinion, governed by the rules contained in the Tenancy Act.

The tenant placed in possession of the land in suit died without heirs as limited by Section 59 of the Tenancy Act and the Local Government was justified in treating the grant to him as having lapsed.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 108.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

BHAGWAN DAS AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

HARDIT SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 359 OF 1901.

Religious institution—Dera Gurn Nanak Sar in village Takhtpura, Ferozepur District—Mahant—Removal of—Powers of villagers.

Held, that the village proprietary body had failed to prove that by custom they had a right to remove for misconduct the Mahant of Dera Gurn Nanak Sar in village Takhtpura of Ferozepur District, and that no misconduct justifying the removal of the defendant from mahantship was established.

Appeal from the decree of W. C. Renouf, Esquire, Additional Divisional Judge, Ferozepur Division, dated 3rd January 1901.

Rai Sahib Lala Sukh Dial, Pleaders, for Appellants.

Mr. Gouldsbury, Advocate, for Respondents.

JUDGMENT.

KENSINGTON, J.—(3rd Feby. 1905).—For practical purposes this is a suit for removal of the *mahants* of an institution known as Dera Guru Nanak Sar in the village Takhtpura. The lower Courts have concurred in finding that the *mahants* have misconducted themselves or mismanaged the institution to an extent justifying their removal, and have given the plaintiffs, as to representatives of the village body, a decree for removal of the defendants from possession of the considerable area of land attached to the institution. The decree is obviously defective in so far as it makes no arrangements for carrying on the institution and does not say who is entitled to possession, but this was unavoidable under the inconvenient form in which the suit is brought, the plaintiffs not having armed themselves with anything in the nature of a mandate to the Civil Courts, under Section 539, Civil Procedure Code, to enable the latter to deal with the case completely.

The original defendants were Bhagwan Das and Ram Das. It appears that the latter did not authorise Bhagwan Das to include his name as an appellant. He has since died and, as no authorised representative appears in his behalf, his name has been struck out and the appeal proceeds in the name of Bhagwan Das alone.

The general principles upon which cases of the kind should be determined are laid down in *Bawa Sukhram Das v. Barhamपुरi* 122 P. R., 1890, *Giyin Parkash v. Hizzura Singh*, 3 P. R., 1899, and *Prem Singh v. Labh Singh* 89 P. R., 1901.

In the present case it is clear enough that the land attached to the institution was made over from village property. The assignment was brought about through the influence of Sardar Bhagat Singh, but his personal share in the matter was limited to remission of the revenue. The *munfi* grant has been since resumed.

It is no doubt reasonable to urge, that as the institution is supported by village land, the villagers ought to have some control over the management, and from this point of view we are reluctant to interfere with the decision of the Lower Courts.

But as a matter of fact the management has not been in village hands, and no representatives of the village asserted a right to control the succession to the mahantship when it passed from the previous holders, Partab Das and Narain Das. Both these men are now dead, but Partab Das was alive when the suit was instituted and gave evidence before the local commissioner. It is

clear that he appointed Bhagwan Das as his successor without interference, though possibly in accordance with arrangements made through the spiritual brotherhood or *bhek* to which he belonged. It can hardly be said that the villagers have established a customary right to intervene, even if there was the clearest proof of gross misconduct by the defendant Bhagwan Das. Their proper course, if they desired a change, would have been to move either Partab Das or the *bhek*.

And turning to the evidence the plaintiffs' case is weaker still. The misconduct chiefly alleged against Bhagwan Das is that he is an undesirable character, that he stirs up false cases, that he misappropriates the proceeds from the land and that he allows the buildings to fall into disrepair. The only evidence brought by plaintiffs in Court was that of two neighbouring *zaildars*, but a number of witnesses were examined by a commissioner. We have heard that evidence and cannot treat it as establishing any definite charges. Narain Singh, *lambardar*, and many other proprietors of the village are distinctly in favour of the defendant Bhagwan Das. Other persons, mostly belonging to other villages, testify against him, but the strongest point alleged even by them is that Bhagwan Das carries off the produce of the land and makes it over to his preceptor in Rake, some six miles off. There is considerable doubt how far even this is true. At any rate Bhagwan Das is not charged with gross immorality or even with waste by alienation of the land, while such allegations as are made against his character are so vague that they may well be prompted merely by some private grudge.

The village is so far from unanimous about the defendant being an improper person for the office of *mahant* that we cannot accede to a claim brought by two self-constituted representatives. Even if we assume that these persons are acting for the good of the village shrine and without interested motives, we cannot hold that they have established their case. The Lower Courts do not seem to have sufficiently examined the evidence upon which they have given plaintiffs a decree. It is clear that no such overwhelming case has been made out as to justify the Civil Courts in the strong measure of interference.

The defendants' appeal is accordingly accepted and the plaintiffs' suit is dismissed with costs throughout.

Appeal allowed.

APPELLATE SIDE.

No. 109.

CIVIL.

*Before Mr. Justice Johnstone and Mr. Justice Shah Din.*SHAM SUNDAR, AND OTHERS,—DEFENDANTS,—APPELLANTS,
*versus*SODHI HARBANS SINGH,—PLAINTIFF ; } —RESPONDENTS.
AND OTHERS—DEFENDANTS,

CASE No. 377 OF 1902.

*Punjab Laws Act (IV of 1872), Sections 12, 15—Pre-emption—Compound interest on money awarded to vendee—Plaintiff claiming for benefit of another—Burden of proof—"Land"—Vendee owning small bit of culturable land used as building site.**Held*, that the defendant, on whom the onus lay, had failed to show that the plaintiff did not file the suit for pre-emption for his own benefit, but for the pleader engaged in the case, who it was shown was a personal friend of the plaintiff and had apparently taken extreme personal interest in the matter of the claim.*Held*, also, that a small bit of land, at one time agricultural and assessed with revenue of 9 pies, purchased by the vendees after it had been built over could not be considered as "land" conferring the right of pre-emption on the vendees. 7 P. R., 1896, 153 P. R., 1888, 96 P. R., 1898 referred to.*Held*, also, that under Section 15 of the Punjab Laws Act, compound interest may be allowed to the vendee.*First appeal from the order of Rai Sahib Lala Karam Chand, District Judge, Ferozepore, dated the 23rd December 1901, decreeing the claim on payment of Rs. 8,968-8-0.*

Mr. Shadi Lal, Advocate, for Appellants.

Pandit Sheo Narain, Pleader for Respondents.

JUDGMENT.

JOHNSTONE, J.—(5th January 1907).—This appeal and No. 390 of 1902 are cross-appeals and can be conveniently disposed of together. The facts have been set forth and also the pleadings, at length, by the learned District Judge in his judgment dated 23rd December 1901, and I need not repeat them here.

As the case has been argued before us the points for decisions are these :—

(1) Did the pre-emptor Partab Singh (original plaintiff) sue not for his own benefit but for the benefit of the pleader, Chanda Singh? If for his own benefit then is there any reason why in view of what has happened after his death, the suit should not be entertained.

-
- (2) Have the vendees an equal right of pre-emption with plaintiff ?
(3) Is there any reason for increasing the sum of money to be paid by plaintiff ?
(4) Is there any reason for reducing that sum ?

After hearing arguments and giving the whole case my best attention I have arrived at the conclusion that the decision of the learned District Judge should be upheld in every particular except that compound interest should be allowed.

As to the first question the theory of the appellants, vendees, is that Chanda Singh and Partab Singh were intimate friends ; that the former had a right of pre-emption while the latter had not ; that the latter who is an experienced pleader, and apparently a man of some means, put up the former who was poor to sue, intending to take over the bargain from him after a successful issue of the suit.

There are some indications of the extreme personal interest which Chanda Singh took in the case after the death of Partab Singh, as the history of the matter thereafter shews. Chanda Singh was Partab Singh's counsel in the case. When Partab Singh died, Chanda Singh was instrumental in getting one Bhagat Singh, uncle of the minor plaintiff, who is son and heir of Partab Singh, made next friend of the minor for the suit, and Chanda Singh, from that time at least, seems to have provided the sinews of war for the struggle with the vendees. When the decree was obtained it was Chanda Singh who paid in the decretal money into Court and who took possession of the land under *dakhkh* nama in which he called himself pleader for the decree-holder. He then applied for mutation of the land in his own name, on the ground that Bhagat Singh had sold the land to him by an oral sale. This was in the end refused, the minor's mother objecting. He then sued for possession on the basis of the alleged oral purchase and (in the alternative) for recovery of the money he had paid in (which was still in Court) together with further sums which he claimed as due to him, making the minor sole defendant. That case was fought out up to the Chief Court, where it was heard by a Division Bench consisting of Johnstone and Lal Chand JJ., the result being that it was finally held that there was no valid sale of the land by the minor to Chanda Singh who was only entitled to the refund of the sum he had actually deposited in Court on behalf of the minor. As to the time and manner of this refund, these were made dependant on the decision of the appeals now under consideration. Chanda Singh had already applied to be made

appellant and respondent respectively in these appeals in place of the minor, but this has not been done. Lastly in his statement in the mutation case before Lala Amir Chand, Revenue officer, pp. 197, 198 paper book, Chanda Singh said things which shew his personal interest at that time, July 1902. In my opinion all of this goes no further than to show that *after Partab Singh's death* Chanda Singh saw his opportunity. It does not show that Partab Singh was not suing for his own benefit. There is no proof that Partab Singh would have been unable to pay for the bargain he was suing for. I would hold, then, that Partab Singh sued for his own benefit, or at least that the contrary is not established; and I can see no reason in these circumstances why present plaintiff's suit should be dismissed because a crafty pleader has attempted to make profit out of his position, an attempt, I may note, which has been completely foiled by the resolution and courage of the plaintiff's mother.

Turning to the second question I observe that one looks in vain at the vendee's pleas, put in before the framing of issues, for any assertion or contention that their right to purchase was equal to that of plaintiff. They did plead limitation, and were successful on the point in the first Court, but the appellate Court took the opposite view and remanded the case for retrial on the merits. It is suggested that the last sentence of para. 2 of the original pleas—see page 10, paper book of Civil Appeal 1273 of 1896—involves a denial of the plaintiff's superior right; but the whole of that para must be read together. If this is done, it becomes at once apparent that the closing sentence, "No right of pre-emption accrues to plaintiff", refers to the plea of the limitation and not to any theory of the possession by the vendees of pre-emptive powers. It was only after the remand for the trial that the vendees pleaded that they had an equal right with plaintiff by reason of their ownership of a minute plot of 6 *marlas* of land in the *Mauza* in which the land in suit is situate. This circumstance, coupled with the fact that the mortgagees, vendees, issued a notice in March 1892 to pre-emptors, which they would hardly have done if they also had a right of pre-emption under section 12 of the Laws Act shows that the view of the Court below is justified that the plea was an afterthought.

But even if the plea be taken seriously, it seems to me clear that it must fail. The 6 *marlas* aforesaid is to all intents and purposes *abadi* land. It was apparently "culturable" in 1886-87: but soon after it was

built over and sold to the vendees. At that time it does not appear to have been assessed to land revenue, and it is not till after the remand for retrial aforesaid that we find the minute assessment of 9 pies shewn against it in the papers. It appears to have been a plot really of no use except for building on. Mr. Shadi Lal, for the vendees, insists that it is "land" within the meaning of the word in the Laws Act.

He also suggests that it might be taken that the plot and also the land in suit are really part of the city of Ferozepore in which case section 12 of the Act would not apply and plaintiff's suit would at once fail. This suggestion I think we should absolutely decline to consider. We have no materials to decide it upon, and it is an entirely new suggestion not altogether consistent with vendee's reliance upon section 12 and their ownership of the 6 *marlas*. In support of the applicability of section 12 to the vendee's case Mr. Shadi Lal refers us to 7 *P. R.*, 1896, and Mr. Sheo Narain relies upon 153 *P. R.* 1888 and 96 *P. R.*, 1898 in which the case of 1896 is discussed. In my opinion it is possible to be too pedantic in these cases. I do not think it can have been the intention of the law to allow a party simply because he owns a minute plot of land described at the time in the papers as unassessed and as *ghair mumkin abadi* and covered with buildings to pose for pre-emption purposes as a landowner in the village. I prefer to take the rulings of 1888 and 1898 as my guide, and to hold that the plaintiff's right of pre-emption is distinctly the superior.

Questions (3) and (4) naturally go together, the latter being the net outcome of the cross-appeal by plaintiff. As stated before us the vendees claim the following sums.

(i)—*Improvements.*

	Rs.
2 wells	1,000
1 drain	50
3 jhallars	150
2 kothas	200
Total	1,400

(ii)—Reclamation of land, Rs. 200.

(iii)—Litigation expenses in past cases, Rs. 2,850, and a large sum on account of interest which I will discuss later.

As regards (i) and (ii) I have carefully noted all the evidence on the record on which the vendees rely, and I find it vague and unsatisfactory.

The Court below has allowed Rs. 700 as to (i) which I think fair and equitable. No doubt wells, &c., were made, but the amount claimed is extravagant, and it is supported by no documentary evidence, not even by vendee's books. No doubt before the remand vendees were ready to produce their books; but, on retrial, it was certainly their duty to prove their case, and whether they were served with a notice to produce their books or not, it can hardly be said that they have proved the expenditure of Rs. 1,600 when they have not put in their accounts. This is sufficient reason also for disallowing (ii).

As to (iii) we have nothing but the vaguest details of the figures, and the vendees counsel admits he cannot give us chapter and verse. He details five suits, and states what was spent in each; but there is no proof whatever of actual figures. It is also rather doubtful whether under the law a pre-emptor is bound to pay such items to the vendees. I do not think I need discuss this point in an elaborate way, but a few remarks will not be out of place.

Section 16 of the Act does not expressly allow a Court to award to vendees more than the market value or what they paid in good faith for their bargain; or to mortgagees who have foreclosed more than the total sum due on the footing of the mortgage or the market value. But the section has more than once been held not to be exhaustive, and it only lays down what is to be allowed as *price* to be paid. I do not think it was intended to exclude equities; but, on the other hand, a party who asks for equity must show that he has consistently done equity and has acted throughout fairly and honestly. Here plaintiff sued for pre-emption and the vendees met him with an unwarrantable plea of time-bar, causing immense delay in the disposal of the case and great annoyance and loss to the plaintiff. Then, not having in the first trial pleaded a right of pre-emption equal to that of plaintiff, after remand they put forward that plea which has been found artificial and made up. A good deal of the litigation for the expenses of which they demand compensation would never have been launched against them, had they met plaintiff's claim in the proper spirit and fought him at most on the question of how much he should be made to pay them. Whatever, then, may be the general principle applicable to such claims as this of the vendees it seems to me fairly clear that they are entitled to nothing under the head now being considered.

As regards interest the Court below has allowed to the vendees Rs. 4,268-8-0 on the principal sum, which is Rs. 4,000, Rs. 680 of the

interest having been paid. The calculation has been made at simple interest at 15 per cent. per annum up to 21st November 1892, on which date defendants vendees got actual possession; but the vendees before us claim compound interest with yearly rests up to February 6th, 1894, when the four months' grace given under the compromise expired. I confess I am unable to see why the calculation should be carried up to February 1894. No doubt, it is not stated in the deed that when mortgagees get possession interest shall cease; but this is usually understood; and, in any case, equity would require that from the interest between 21st November 1892 and 6th February 1894 the profits of the land should be deducted.

As to simple versus compound interest it is contended for plaintiff that section 15 of the Act only contemplates simple interest; but this is a narrow view. Interest on the principal sum may be, in my opinion, simple or compound. Compound interest is not interest on interest: it is interest on a sum or sums, which were interest but which, on default of liquidation immediately became principal. I would thus allow compound interest.

Looking at the cross-appeal I find that all the grounds in it have been waived by the learned pleader for the plaintiff, except that relating to land taken up by Government out of the land in suit. It is said that Government paid to the vendees Rs. 222-0-0 on this account, and that this should be deducted from the amount to be paid by plaintiff. There is nothing on the record about this, as the acquisition by Government occurred after the decree in this case was passed. The item is disputed, and I do not think we should go into it at all.

It is urged that the Court below should not have given plaintiff costs against the vendees, inasmuch as plaintiff in the first instance offered the inadequate sum of Rs. 5,934-0-0 as due to vendees under the deed of mortgage on 13th November 1889, date of expiry of year of grace under the Regulation, the suit having been filed on 18th March 1896. But this does not take account of the facts already noted that vendees resisted the claim on other grounds besides the inadequacy of the offer. I would leave the order of the lower Court in re costs undisturbed.

My calculation of principal and interest from 12th October 1885 to 21st November 1892 at 15 per cent per annum, with compound interest upon yearly rests, allowing for the three payments shown at foot of page 173, brings out a total of Rs. 9,478. To this add Rs. 700 as

allowed in addition by the Court below for improvements, and we have the total sum to be paid as Rs. 10,178.

In the Court below Rs. 8,330-11-9 was the net sum to be deposited (and actually deposited) by plaintiff after deduction of his costs, which amounted to Rs. 637-12-3. Plaintiff must have those costs and also his costs upon the present appeal in this Court, inasmuch as he has virtually won the day here. His costs here amount to Rs. 100, and if this and the sum of Rs. 637-12-3 aforesaid be deducted from the sum of Rs. 10,178 aforesaid, the net sum demandable of him is Rs. 9,440-3-9.

He must make up this amount within two months or the suit will stand dismissed with costs. I would accept the appeal and modify the decree of the first Court in this sense.

SHAH DIN, J.—(5th January 1908).—I agree.

Appeal accepted.

APPELLATE SIDE.

No. 110.

Civil.

Before Mr. Justice Kensington, and Mr. Justice Hurry.

Mussammat ALAH JAWAI,—(PLAINTIFF),—APPELLANT,

versus

MUHAMMAD HASSAN, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 363 OF 1904.

Wakf property—Burden of proof—Takia Kutab Garhi in Lahore.

Held, that the plaintiff, on whom the burden of proof lay, had failed to prove that the Takia Kutab Garhi, situate in Lahore, is *wakf* property; that whatever the original history of the property might have been it had long since passed into private hands.

First appeal from the decree of Lala Chuni Lal, Subordinate Judge, 1st Class, Lahore, dated the 10th August 1903, dismissing the claim.

Messrs Oertel, the Hon'ble Shah Din and Harsukh Rai, Advocates, for Appellant.

Mr. Beechey, Advocate, and Rai Sahib Lala Sukh Dial, Mian Tajad-Din Ahmad and Lala Gopal Chand, Pleaders, for Respondents.

ORDER.

CHATTERJI, J.—(7th December 1905).—Ramzan, identified by Palmukand, who is known to Rai Sahib Lala Sukh Dial, states that he

does not wish to prosecute the appeal and withdraws from it. The other appellant, however, has not given it up. Appellant is of course at liberty to withdraw, and the appeal will be dismissed as far as he is concerned. Notice will be given to the other party of his withdrawal at the cost of the appellant, and if he does not pay process fees for this purpose, he may be made liable for costs of the other side.

JUDGMENT.

KENSINGTON, J.—(9th August 1906).—The name of *Mussammât Jio* is struck out from the list of representatives of the deceased defendant, respondent, Muhammad Bakhsh, it being represented on her behalf that she is not his widow.

The facts of the case have been sufficiently given by the lower Court. The appeal now stands in the name of the plaintiff, *Mussammât Alah Jawai* alone, the co-plaintiff *Ramzan* having been permitted to withdraw from the appeal in terms of a previous order dated 7th December 1905.

The appeal has been stamped at Rs. 37-8-0 only, and on behalf of the plaintiff-appellant, this is explained to us as meaning that the plaintiff now claims in respect of two declarations only: (1) that the property in suit is *wagf*, and (2) that the alienation by sale of a part of the property by the defendant, Muhammad Bakhsh, to the defendant, *Narpat Rai*, on the 4th October 1900 (page 44 of the paper book) is invalid, together with such other relief as is referred to in Mr. Martineau's order of 11th March 1904.

We have some difficulty in understanding how the plaintiff's claim can be really considered as a whole until she had paid Court-fee on the entire value of the property which is admittedly large, as suggested in the order of Mr. Martineau, Divisional Judge, already referred to. There has been a lengthy discussion on this point, the plaintiff urging that the appeal is pressed in respect of the two declaratory reliefs only. We eventually decided to allow the appeal to proceed on this basis, subject to further consideration of the stamp question if it should appear that the plaintiff could succeed in establishing any sort of case.

The points immediately before us are therefore much narrowed down, and the case may be dealt with very shortly.

We have examined the entries in the record and the evidence brought by the plaintiff, and can find nothing in all this to support her main contention that the entire property is *wagf*, or that it has

ever been treated as anything but the private property of the persons recorded as owners in 1868, (page 35).

The only piece of evidence upon which plaintiff relies in order to meet the presumption arising from the entries in the records is the agreement of 4th February 1890, (page 39) which purports to declare the building known as the *Taqia Kutab* Garhi to be the property of the whole community. As to this it is impossible to get over the objection raised in the lower Court, (page 15) that if this agreement is to be taken as a title deed it is inadmissible in evidence as not having been registered. But besides this fatal objection we do not think that the very loose terms of the agreement can be taken as referring to anything more than the mosque and well which are specifically mentioned, and which are not claimed as private property by the defendants.

We take it that whatever the original history of the property may have been it has long since passed into the private hands of certain members of the *Kanjar* community, who have no doubt allowed their community generally to worship in the small mosque which stands on a small part of the property at one side, but that beyond this there has been no exercise of public rights.

There are admittedly some 25 families of this particular branch of the *Kanjar* community in Lahore. It may be safely assumed that the impossibility of establishing public control over the property is generally recognised, seeing that only two plaintiffs have come forward and that one of them has withdrawn leaving a lady alone to prosecute the appeal. The fact that plaintiff's principal witnesses come from Amritsar and elsewhere is also a strong indication in the same direction. It is hardly conceivable that if she had any case at all she would not have been more cordially supported by members of the community resident in Lahore.

It is unnecessary to discuss the case in further detail. The appeal fails and is dismissed without calling on the defendants to do more than clear up certain points in the case. The plaintiff does not require protection by way of declaration in respect of the mosque as that is expressly excluded from the sale in dispute, and no case of action has arisen in respect thereof.

We make no order as to costs in this Court as the defendants represent different interests and do not press for distribution of the

very small costs which could be given on the appeal in the limited form in which it has been brought.

Appeal dismissed.

APPELLATE SIDE.

No 111.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Roberston.

HIRA SINGH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
versus

GULAB SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 169 OF 1906.

Custom—Alienation by sonless proprietor in favour of collaterals—Right of collaterals in the ninth degree to object—Res-judicata—Necessity—Delay in suing—Collateral's individual right.

Held, that in the districts in the Central Punjab collaterals of a sonless proprietor so far removed as in the ninth degree are competent to contest validity of alienations made by the proprietor in favour of nearer collaterals or strangers.

Held, also, that in case of long delay in filing suit to contest alienations as made without necessity, though the acts of the alienors should not be narrowly scrutinized, yet when there is no indication that there was necessity for any of the alienations the objections must be allowed and the alienations held invalid.

Held, further, that a judgment in a previous declaratory suit to set aside an alienation dismissing the claim on the ground that the plaintiffs were too remotely related to the alienor to sue, operates as a bar to the hearing of a subsequent suit attacking the alienation, if the Court in which the previous suit was filed was competent to hear the subsequent suit, and that the judgment does not operate as a bar against collaterals who did not join the plaintiffs in their previous suit.

Held, also, that collaterals claim property in their individual rights and are not entitled to possession of property which descends to other collaterals equally with them.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 9th day of November, 1905, modifying the decree of Rai Bahadar Pandit Janki Pershad, Subordinate Judge, 1st Class of Amritsar, dated 29th August, 1904, dismissing claim in toto for 566 kanals and 11 marlas of land.

Lala Hukm Chand, Pleader, for Appellants.

Lala Lachhmi Narain, Pleader, for Respondents.

JUDGMENT.

CHATTERJI, J.—(15th January 1908).—Gujar Singh respondent died in the course of the appeal in the Divisional Court and

his son Harnama minor was put on the record in the lower Court, but the deceased was shown as a respondent in the petition of appeal filed here and his heir has not been impleaded.

The facts are given in the judgments of the lower Courts. By our direction pleaders on both sides have filed a list of the alienations in dispute with the necessary particulars. They are 11 in number and dates range from 19th March 1881 to 19th July 1894. By these alienations 524 *kansals* 6 *marlas* in all were transferred for a total sum of Rs. 4,640. Of the Nos. 1 and 11 are not challenged. We shall hereafter denote the alienations in suit by the numbers given in this statement.

The pedigree-table is not disputed, though it is a long one and apparently taken from the Settlement record of 1865. It shows that defendants Nos. 16 to 39 are equally related with the plaintiff to the deceased owner Jaimal Singh, and that the other defendants Nos. 1 to 14 are one degree further removed, the former being descended from the common ancestor Ghulla and the latter from Ghulla's father Nahar. Plaintiffs admitted the rights of defendants Nos. 16 to 29 and impleaded them as defendants because they did not join in making the claim. Plaintiffs denied the rights of the others. Defendant No. 15 is an outsider.

There were two previous suits of this description which were dismissed on the ground that persons so distantly related as the plaintiffs had no right to object to alienations by the male proprietor. Only one of these judgments acts as a bar under section 13, Civil Procedure Code, being that of a Court competent to hear the present claim. Thus Vadhawa Singh, Jowahir Singh and Sawan Singh plaintiffs alone are debarred from suing in consequence of the previous finding. But only four plaintiffs Sher Singh, Hira Singh, Jowala Singh and Wazir Singh have filed the present appeal, and we are concerned only with the shares that properly belong to them.

The first question for determination is the *locus standi* of the plaintiffs. On this point the two previous decisions are against them, but the weight of later authority is in their favour. The present enquiry has not brought out anything new against them. Amritsar is a district in central Punjab in which the agnatic principle is very strong, and, on the whole, we find no cogent reasons to differ from the finding of the Divisional Judge. The plaintiffs are therefore competent to sue.

It only remains to examine the various alienations. We may lay down generally as the result of our examination of the record that

consideration is proved to have been paid for all the transfers and that plaintiffs have failed to show the contrary. Their delay in suing may be partly responsible for this result in some instances, but there can be no doubt that all contention on this head must be overruled. The only point that remains to be considered is that of necessity.

It seems to be evident that Jaimal, though he paid some debts, spent money freely, utilizing the credit of his land for this purpose. At the same time plaintiffs did not exert themselves to restrain him. A few of them sued him in a half-hearted way in respect of particular alienations, but the cases were never carried to higher Courts. It may be a question whether the adverse decisions against the competency of the then plaintiffs to sue do not create an equity in favour of the alienees in that they saw these decisions acquiesced in, and naturally were led to believe that they were quite safe, but this would be carrying the effect of plaintiffs' inactivity too far and some of the alienations are prior in point of date. We consider, however, that plaintiffs have undoubtedly made great delay in suing and justice requires that we should treat the alienations in a liberal spirit and not seek to narrowly scrutinize the acts of the alienors.

Acting on these principles we agree with the view of the Divisional Court as to necessity in respect of all the alienations, except Nos. 3 and 10. Under the former out of Rs. 1,000, Rs. 840 were advanced in cash, of which there are no details, and the only witness now called cannot say anything as to the necessity. This item of Rs. 840 must be disallowed. In regard to No. 10, Labh Singh's sale, dated 22nd June 1893, Rs. 400 and 220 out of Rs. 800, are really unaccounted for and the statements of the witnesses as to necessity are discrepant. We allow Rs. 100 which were advanced on a bond. Thus the total amount allowed is Rs. 180.

Objections were made to deeds Nos. 7 and 8, but, after considering the evidence, we think they should not be interfered with. Deeds Nos. 4, 5 and 9 also appear to have been rightly maintained by the lower Courts.

Plaintiffs' shares alone should be decreed to them and plaintiffs Nos. 1, 3 and 4 Sher Singh, Hira Singh and Jowala Singh, are entitled to $\frac{1}{3}$ each and Wazir Singh, plaintiff No. 8 to $\frac{1}{240}$ share of the land in suit.

We accept the appeal and decree possession of the above shares to the plaintiffs above named in the land covered by deed No 3, in favour of Gulab Singh, defendant, dated 26th November 1889, on payment by plaintiffs Nos. 1, 3 and 4 of $\frac{3}{8}$ of Rs. 160, and by plaintiff No. 8 of $\frac{1}{240}$ th and in land sold by deed No. 10 in the same manner on payment of $\frac{3}{8}$ of Rs. 180 by the first named 3 plaintiffs, and $\frac{1}{240}$ th of Rs. 180 by plaintiff No. 8.

Under the circumstances of the case parties to this portion of our decree should pay their own costs throughout.

The rest of the claim is dismissed against the defendants properly interested in the same, with costs, the decree of the lower Courts being so far maintained. The decree against defendant No. 15 is also upheld.

Appeal partly accepted.

REVISION SIDE.

No. 112.

CRIMINAL.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

ISHAR DAS,--(CONVICT),--PETITIONER,

versus

THE KING-EMPEROR OF INDIA,--(PROSECUTOR),--RESPONDENT.

CASE No. 1274 OF 1907.

Criminal Procedure Code (Act V of 1898), Section 198—Penal Code (Act XLV of 1860), Section 500—Defamation—Termination of prosecution on death of complainant.

The death of the complainant during the course of criminal proceedings for defamation has the effect of terminating those proceedings. *I. L. R., XXXI Cal., 993 (F. B.) referred to.*

Petition under Section 439 of the Criminal Procedure Code, for revision of the order of S. W. Gracey, Esquire, Sessions Judge, Amritsar Division, dated the 31st July 1907, confirming the order of Pandit Sri Kishen, Magistrate, 1st class, Gurdaspur, dated the 13th June 1907, convicting the petitioner.

Mr. Gurcharn Singh, Advocate, for Petitioner.

JUDGMENT.

REID, J.—(8th January, 1908).—The question for consideration is whether the death of the complainant during the course of criminal proceedings for defamation necessarily terminated those proceedings.

The offence of defamation is compoundable without permission of the Court before conviction, and even after conviction with permission

of the Appellate Court, and under Section 198 of the Code of Criminal Procedure no Criminal Court can take cognizance of the offence except upon the complaint of a person aggrieved.

Prosecution for defamation is essentially a personal action, and the institution of proceedings depends on the temperament of the person defamed.

In Krishna Bihari Sen v. Corporation of Calcutta, I. L. R., XXXI Cal. 993, (F. B.) it was held that Section 89 of the Probate and Administration (Act V of 1881) contained the law on the subject of a cause of action surviving to the representative of a deceased plaintiff, and the principle underlying the rule laid down in the section cited is, in our opinion, applicable to the question now under consideration, having regard to the narrowness of the line between a prosecution and a suit for damages.

For these reasons we answer the question in the affirmative, and hold that the complaint should have been dismissed on the death of the complainant and could not be prosecuted by her children.

We allow the application and set aside the conviction and sentence. The fine, if realised, will be refunded.

Petition accepted.

APPELLATE SIDE.

— — —
No. 113.

CIVIL.

Before Mr. Justice Chatterji, C. I. E.

BAIJ NATH AND OTHERS,—(DEFENDANTS),—APPELLANTS,
versus

SHAMBOO NATH,—(PLAINTIFF),—RESPONDENT.

CASE NO. 98 OF 1906.

Hindu Law—Custom—Pleadings—Adoption—Succession, Right of collaterals of adoptive father to succeed to the property of adopted son.

It cannot be urged for the first time on appeal that the case should be decided according to general custom when the case has been decided according to the personal law of the parties on their pleadings in which they have admitted that they do not know of any custom contrary to their personal law. Under Hindu Law a daughter's son cannot be adopted in the *dattaka* form by twice-born classes.

The family of the adopted son is not altered and no relationship with the adoptive father's collateral relations is established when adoption is not according to *dattaka* form, but according to established custom prevailing among non-agriculturists or *kritrima* form.

Further appeal from the decree of Khan Bahadur, Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Jhelum Division, at Jhelum, dated 10th October 1905.

Mr. Nanak Chand, Advocate for Appellants.

Pandit Ram Bhaj Datta, Pleader for Respondent.

JUDGMENT.

CHATTERJI, J.—(19th May 1906).—The facts are given in the judgment of the lower Courts. It does not appear that the mortgagee, Baij Nath, who is the appellant before me, admitted the adoption of Ganpat Rai; see genealogical tree in the judgment of the Divisional Judge; and the admission of the widow does not bind him. The widow, however, distinctly denied plaintiff's right of reversion.

The plaintiffs clearly admitted that the parties were governed by Hindu Law and that they did not know of any custom contrary to that law. The first Court also framed issues on this basis, and both Courts have decided the suit on the same. I cannot at this stage admit the argument of respondents' counsel that we should go into the incidents of adoption under Punjab custom.

The Divisional Judge is quite wrong in his view of the rights of the adopted son in this instance. The passage quoted from Mayne treats of *dattaka* adoptions, but it is settled law now that a Hindu Brahman cannot adopt his daughters' son. *Vide Bhagwan Singh versus Bhagwan Singh, L R., 26 I.A., 153.* The adoption, therefore, could not be a *dattaka* adoption, and if it is not, the family of the adopted son is not altered, but he continues as he was before. The whole argument of the Divisional Judge thus falls to the ground. If there was no *dattaka* adoption the heirs of Sheo Nath, the brother of Ganpat, are the reversionary heirs of the property and plaintiffs are not.

Had Punjab customary adoption other than agriculturist adoption been applicable, the same result would have followed. The connection of Ganpat Rai with his natural family would not have been cut off. Similarly, if the adoption is treated as a *Kritrima* adoption, there is no change in the adopted son's family, and no relationship with the adoptive father's collateral relations, Rattigan para. 49 and 55. Neither *P.R.*, No. 147 of 1889, nor No. 21 *P. R.*, 1890 is against this view. The fact of those cases were different, and there was no question about adoption in the *dattaka* form being impossible. In the former case the adoptive father by virtue of the adoption was clearly a superior heir to his adopted son, and the latter case was decided under Hindu Law under which

plaintiffs have no right. They expressly stated that they were ignorant of any custom opposed to Hindu Law. An adoption, with all the consequences of the *dattaka* form of a daughter's son is invalid and impossible under Hindu Law among the twice born classes.

The agricultural custom of reversion to the adopter's family on the male line of the adopted son dying out, has, of course, no application here, the parties being bound by Hindu Law and being *Brahmans* and residents of a town and the property in suit being house property.

The plaintiff's suit accordingly fails. They have no heirship to property held by the daughter's son of Ram Kishen, their grand-uncle.

I accept the appeal and restore the decree of the first Court, dismissing the plaintiff's suit with all subsequent costs.

Appeal accepted.

REFERENCE SIDE.

No. 114.

CIVIL.

Before Mr. Justice Johnstone.

MIRAN BAKHSI, — (PLAINTIFF), — APPELLANT,
versus

GHANAYA AND OTHERS, — (DEFENDANTS), — RESPONDENTS.

CASE No. 85 of 1907.

Jurisdiction of Civil and Revenue Courts—Punjab Tenancy Act (XVI of 1887), Sections 14, 77 (3) (u)—Landlord and Tenant.

The plaintiff, an occupancy tenant, sued the defendant for damages for preventing him from cultivating land of his holding. It was not alleged that the defendant had been in possession of the land or had occupied it.

Held, that the suit was triable by the Civil Court.

Civil Reference under Section 99 of the Punjab Tenancy Act (XVI of 1887).

JUDGMENT.

JOHNSTONE, J.—(4th January, 1908).—I entirely concur in the views of the officers who have sent up this reference. The suit is not one for a Revenue Court. Plaintiff is occupancy tenant of certain land. Defendant by force has prevented him from cultivating it, and he sues for damages. He sues—see Section 77 (3) (u), Punjab Tenancy Act—neither for “arrears of rent” nor for the “money equivalent” of arrears of rent, nor for “sums recoverable under Section 14,” Punjab Tenancy Act. Section 14 runs thus:—

Any person in possession of land occupied without the consent of the landlord shall be liable to pay for the use or occupation of that land at the rate of rent payable in the preceding agricultural year, or, if rent was not payable in that year, at such rate as the Court may determine to be fair and equitable.

In the present case plaintiff is not a landlord, and it is not alleged that defendant has been in possession of the land or has occupied it. The cause of action is not the use or occupation by defendant but the obstructing by defendant of plaintiff's cultivation.

I direct that the case be tried by the Civil Court.

Reference returned.

APPELLATE SIDE.

No. 115.

CIVIL.

Before Mr. Justice Lal Chand.

PALA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

vs. sus

NUR MUHAMMAD AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 1128 OF 1904.

Custom—Alienation by childless male proprietor—Gift to daughter's son and son's daughter—Arains of Nakodar Tahsil.

Held, that by custom prevailing among *Arains* of the Nakodar Tahsil of Jullundur District, a gift of ancestral property by a sonless proprietor in favour of his daughter's son or son's daughter is valid.

Further appeal from the decree of J. G. M. Rennis, Esquire, District Judge, Jullundur Division, dated 16th June 1903.

Mr. McDonald, Pleader, for Appellants.

Rai Bahadur Bakhshi Sohan Lal, Pleader, for Respondents.

JUDGMENT.

LAL CHAND, J.—(30th April 1906.)—The gift in this case was made by a sonless *Arain* of Nakodar Tahsil in favour of his daughter's son and son's daughter married to another daughter's son.

The lower Courts have concurred in upholding the gift, and I see no reason for differing. It is now established beyond doubt that a gift by an *Arain* of Jullundur District of his entire estate in favour of his daughter's son is valid by custom. There could, therefore, be no possible objection against the gift of half his estate made by Ambia in favour of his daughter's son, Nur Muhammad. It appears to me that there is no distinction in principle where the gift is made in favour of a son's daughter, specially as in the present case, she is married to a daughter's son. It is quite consistent with usage, as is also recited in the deed of gift, that Ambia should have treated and brought up his pre-deceased son's daughter as his own daughter and then made a gift in her favour. Such a gift would in no way be distinguishable under Customary Law from a gift made in favour of a daughter's son. The record shows that the plaintiffs were given full opportunity to produce their evidence. The only instance filed by them on the record is irrelevant, being a case of a gift in favour of a

brother's grandson, and even then it was acknowledged that gifts in favour of female relations among Arains of Jullundur are favoured by custom. I, therefore, entirely agree with the view taken by the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

REVISION SIDE,

No. 116.

CIVIL.

Before Mr. Justice Reid, Chief Judge.

RAJJI AND OTHERS,—PETITIONERS,

versus

LAL CHAND AND OTHERS,—RESPONDENTS.

CASE NO. 188 OF 1906.

Act XIX of 1841, Sections 1, 3 and 4—Intestate's property—Jurisdiction of Judge—Review—Rectification of mistake by successor of Judge who passed the order—Revision.

Before the procedure provided by Act XIX of 1841 can be set in motion the title and *bona fides* of the applicant must be *prima facie* clear, it must be manifest that the party complained of had no lawful title to possession, and if the applicant were referred to a regular suit, he would be a serious sufferer as by the risk, of waste or misappropriation or by his inability to prosecute his rights when out of possession.

When it appeared that before issuing citation under Act XIX of 1841 the Judge did not satisfy himself that the person in possession had no lawful title and the person applying was in danger of being injured by delay, and his successor after recording evidence did not consider it right to disturb possession and passed order accordingly—

Held, that the order was not open to objection.

Petition for revision of the order of W. Malan, Esquire, District Judge, Rawalpindi, dated 11th December 1905.

Bhai Seva Ram Singh, Pleader, for Petitioners.

Bhagat Gobind Das, Pleader, for Respondents.

JUDGMENT.

REID, C. J. (20th June 1906.)—The ground on which notice was issued is that the Judge of the lower Court “ exercised a jurisdiction not vested

in him by law in going behind the order of his predecessor who issued citation, and in finding differently from him on the very proceedings on which his order was based."

The property, in respect of which proceedings under Act XIX of 1841 were instituted, was movable and immovable.

The order by the predecessor of the Judge of the Court below was as follows: "Let the other party be summoned and let process-fee be filed. Let the Nazir be ordered to prepare a list of the property carefully. If the property is of much value, the report should be made at once if not then the property should be handed over to someone after taking proper security. No orders can be passed as to the immovable property unless the parties are heard."

The parties were then heard and the following issues were framed:

"Whether there are special circumstances that possession being vacant, property should be delivered to plaintiff?"

"What are the respective rights of parties in the house?"

"Whether there is any custom in vogue by which defendants can exclude plaintiffs from inheriting the estate *O. P.* on defendant."

The second issue conclusively proves that the subject matter of the inquiry included the immovable property, the Court having satisfied itself, by examining parties, to what extent they were at issue, but I see no reason for holding that the Court had before issuing citation, been satisfied that the person in possession had no lawful title, and that the person applying was in danger of being injured by delay.

In *Jusoda Koonwar v. Baboo Gouree Byjnath Pershad* (6 *W. R.* (Mis.) 53), it was held that a slight case is not sufficient to put the procedure provided by Act XIX of 1841 in motion, but that the title and *bond fides* of the applicant must be *prima facie* clear, that it must be manifest that the party complained of had no lawful title to possession and that, if the applicant were referred to a regular suit, he would be a serious sufferer, as by the risk of waste or misappropriation or by his inability to prosecute his rights when out of possession.

Mussammat Jagoji and others v. Manmohan (7 *P. R.*, 1904⁽¹⁾), does not help the petitioners, inasmuch as the facts that the presiding officer of the Court below in the first instance put the cart before the horse did not

(1) *S. C.*, 37 *P. L. R.*, 1904.

operate to prevent a rectification of procedure by that officer or his successor, and the latter was in my opinion justified in doing what his predecessor had left undone, and arriving on the evidence before him at a conclusion whether the delay entailed by a suit for the immovable property would cause serious injury to the petitioner.

For these reasons I dismiss this application with costs.

Petition dismissed.

APPELLATE SIDE.

No. 117.

CIVIL.

Before Mr. Justice Reid, Chief Judge.

HARJI MAL,—(DEFENDANT),—APPELLANT,

versus

POKHAR DAS, AND ANOTHER—(PLAINTIFFS),—RESPONDENTS.

CASE No. 253 OF 1906.

Civil Procedure Code (Act XIV of 1882), Section 53—Amendment of plaint—Conversion of character of suit—Claim for injunction converted to one for possession.

The amendment of the plaint by altering a claim for injunction to one for possession is not open to the objection that the character of the suit is thereby changed.

Miscellaneous first appeal from the order of Lala Kidar Nath, District Judge, Muzaffargarh, dated 23rd February 1906.

Mr. Beechey, Advocate, for Appellant.

Rai Sahib Lala Sukh Dial and Mr. McDonald, Pleaders for Respondents.

JUDGMENT.

REID, C. J.—(25th May 1906.)— This is an appeal against an order allowing amendment of a plaint. The plaintiffs-respondents sued for an injunction restraining the defendant-appellant from interfering with their dealings with certain logs, their property, of which the defendant had wrongfully taken possession. The defendant pleaded title to the logs and the plaintiffs then, on a suggestion by the Court, prayed to be allowed to amend their plaint by claiming possession and damages.

The case is clearly distinguishable from those in which a suit on a document is amended to a suit on an oral contract those in which the cause of action is changed, and those in which a suit against a trespasser is converted into a suit against a tenant. Counsel for the appellants contended that, inasmuch as in the suit for an injunction the plaintiff would require evidence different from that required in the suit on the amended plaint, a suit of one character has been converted into a suit of another and inconsistent character. I am unable to see any inconsistency. In each suit the title of the plaintiff and the invasion thereof was alleged, and the sole difference is in the relief sought. The fact that one suit was under the Specific Relief Act and the other was based on conversion and was for damages, is, in my opinion, immaterial.

In *Musammatt Bibi Hukam Kaur v. Sardar Asa Singh, and others* 1 P. R., 1900, a suit for a declaration of title was converted into a suit for possession.

In *Ghulam Husain v. Shahbaz Khan*, (161 P. R., 1888), a suit for cancellation of a deed of gift of land was held not to be inconsistent with a suit for possession of the land.

In *Bishop Mellus v. The Vicar Apostolic of Malabar and others* (I. L. R., II Mad., 295) and in *Abdulkadar v. Mahomed* (I. L. R. XV Mad., 15) a suit for a declaration was held not to be inconsistent with a suit for possession.

In *Kasinath Das v. Sadasiv Putnaik*, (I. L. R., XX Cal., 805), it was held that an alteration in the relief does not alter the character of the suit, and this rule was incidentally followed in *Raj Narain Das, and others v. Shama Nando Das Chowdhry and others* (I. L. R. XXVI Cal., 845).

The nature of the suit, as amended, is not in my opinion, inconsistent with the suit originally filed, and I dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 118.

CIVIL.

Before Mr. Justice Reid, Chief Judge.

MAKHAN SINGH AND OTHERS,—(DEFENDANTS)—APPELLANTS,

versus

ISHAR SINGH, AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE NO. 1231 OF 1905.

Common land—Partition—Land used for tethering cattle.

Common land used by the co-sharers for tethering cattle is not impartible.

*Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated 3rd October 1904.**Mr. Ganpat Rai, Advocate, for Appellants.**Mr. Browne, Pleader, for Respondents.*

JUDGMENT.

* * * * *

REID, C. J.—(23rd June 1906.)—The lower Appellate Court has attempted to distinguish the facts and the record-of-rights dealt with in *Ishwar Singh v. Atma Singh*, (117 P. R. 1894,) from those of the present case, under the impression that that authority was against partition being effected, at page 450 of the report, however, Benton J. said that over and above the land devoted by common consent for mosques, graveyards, tanks and public-ways, there might be empty sites in and about the village, unoccupied by any individual and not used by the community for any purpose, which might be partitioned according to the rule applicable in the particular case. The authority is therefore in favour of the course adopted by the Courts below. Land on which the co-sharers have been in the habit of tethering cattle has not been dedicated to a common purpose in the sense in which land occupied by mosques, tanks and roads has been dedicated and owners of cattle can after partition tether them on their own land. No authority for the proposition that, *shamlat abadis exvitermini* impartible, has been cited. The record-of-rights describes the *abadi desh*, as joint property of all proprietors and states that no proprietor can eject a non-proprietor and that a proprietor can transfer so much of the residential land as is within his share. It is silent as to partition, but partition is implied by the right of transfer accorded and the reference to specific shares.

The appeal fails and is dismissed with costs,

Appeal dismissed.

REVISION SIDE.

No. 119.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Hurry.

FAZAL DIN AND OTHERS,—(DECREE-HOLDERS),—PETITIONERS,

versus

NARAIN SINGH, AND OTHERS,—(JUDGMENT-DEBTORS),—RESPONDENTS.

CASE No. 1629 OF 1904.

Civil Procedure Code (Act XIV of 1882), Section 295—Punjab Courts Act (XVIII of 1884), Section 70 (1) (a)—Revision—Civil cases—Execution of decree—Rateable distribution of assets among decree-holders.

The Chief Court as a general rule of practice refuses to revise an order passed under Section 295 of the Civil Procedure Code on the ground that the order passed by the lower Court under the section may be set right by suit—66 *P. R.*, 1882 (*F. B.*) ; 8 *P. R.*, 1897 ; 15 *P. R.*, 1901 ; s. c. 80 *P. L. R.*, 1901 ; 21 *P. R.*, 1902 ; s. c. 179 *P. L. R.* 1901 ; 76 *P. R.*, 1903 ; s. c. 170 *P. L. R.*, 1903 ; 65 *P. R.*, 1905 ; s. c. 130 *P. L. R.*, 1905 ; 82 *P. R.*, 1905 ; s. c. 199 *P. L. R.*, 1905, *referred to*.

Petition for revision of the order of F. B. R. Spencer, Esquire, District Judge, Shahpur, dated 13th July, 1904.

Mr. Nanak Chand, Advocate for Potetioners.

Mr. Duni Chand, Advocate for Respondents.

JUDGMENT.

JOHNSTONE, J.—(8th May, 1906.)—Narain Singh, respondent, had a suit against the judgment-debtors in which he obtained a decree for some Rs. 2,100 (including costs) on 19th August 1903. Before judgment he had secured, on 8th August 1903 an order of attachment of the property now in question. The present petitioners had meantime sued the same judgment-debtors, and they obtained an *ex-parte* decree for Rs. 2,700 in round figures (including costs). This decree the respondent, Narain Das, denounces as

collusive ; but we hardly think it necessary to enter upon this matter at present.

The property was brought to auction-sale in the usual way and sold for Rs. 4,100, not being sufficient to satisfy both decrees. The learned District Judge, in whose Court execution was taken out, proceeded to deal with the assets thus : he ordered Rs. 2,104-5-0 to be paid to Narain Das, and the balance of Rs. 1,995-11-0 to be handed to the petitioners in part satisfaction of their decree for Rs. 2,710-6-8 and the costs of the execution proceedings, which had been started by them.

Petitioners now come to this Court and ask for revision of the order, on the ground that it was passed contrary to the provisions of Section 295, Civil Procedure Code, under which there should have been a *pro rata* distribution of assets.

The first question is, whether this Court should interfere on the revision side, another remedy being open to the petitioners under the penultimate clause of Section 295, which runs thus :—

“ If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.”

Now we may concede at once that this Court has power, if Section 70 (1) (a), Courts Act, applies in terms to the case, to revise an erroneous order under Section 295, or an order in which that section has been ignored. But the further question is, whether this Court should interfere, and for a decision of the point we must examine the authorities. It is important that the method of dealing with these cases should be uniform and consistent. The Punjab rulings, to which our attention has been drawn, are these :—

Gorakh Nath v. Bishembar Nath (66 P. R., 1882, F. B.) *Mussammatt Chand Kaur v. Mela Ram* (8 P. R., 1897), *Joti Mal v. Coates* (15 P. R. 1901 (1)); *Sant Singh v. Ghasita and another* (21 P. R., 1902 (2)); *Coates v. Kashi Ram and another* (76 P. R., 1903 (3)); *Parmanand and others, v. Municipal Committee, Lahore* (65 P. R., 1905 (4)), and *The Punjab National Bank v. Salamat Singh and others* (82 P. R., 1905 (5)) .

(1) s.c. 80 P.L.R., 1901. (2) s.c. 179 P.L.R., 1901 (3) s.c., 170 P.L.R., 1903. (4) s.c. 130 P.L.R., 1905. (5) s.c., 199 P.L.R., 1905.

The first of these was a case of insolvency jurisdiction and Barkley, J., laid it down that, though Section 622, Civil Procedure Code, did allow revision of an illegal order, yet in the special circumstances the Court should not interfere. The case does not help much.

In *Musammatt Chand Kaur v. Mela Ram*, 8 P. R., 1897, the Chief Court, finding that upon an application to release certain property from attachment, the lower Court had declined jurisdiction under the impression that the application was barred by authority, and not because it found that the applicant had no case on the merits, decided that the Chief Court could revise even though the petitioner had a right to bring a regular suit.

This decision, if we may say so with all respect, was sound and the determination to interfere was probably wise and proper, because it was a case of refusal to exercise jurisdiction legally exercisable, but the present case is different, for here jurisdiction was not declined, but an order, right or wrong, was passed on the merits.

In *Joti Mal v. Coates*, 15 P. R. 1901 (1), this Court without discussing *Musammatt Chand Kaur v. Mela Ram*, 8 P. R., 1897, took a slightly different view, for it held in the broadest possible way after asserting a power to revise that as a rule, a High Court should refuse to revise when the party aggrieved has another remedy. This *dictum* was based upon two Allahabad and two Bombay rulings. The important part of the judgment is contained in the following sentence:—

“In the present case there is no general question of importance for decision, and if we decided to interfere with the order passed by the District Judge, our interference would not even settle the matter in dispute.....whatever order he might ultimately pass, the aggrieved party would have a “right to contest it by a regular suit.”

This *dictum* was expressly extended so as to cover petitions for revisions whether on ground of illegal assumptions of jurisdiction or mistaken refusal to exercise jurisdiction, or the commission of a material irregularity.

Sant Singh v. Ghasi and another 21 P. R., 1902 (2) is quoted by Mr. Nanak Chand as an authority on the other side; but we are unable to see how it helps him. In that case a plaintiff-pre-emptor had paid into Court Rs. 150, the price fixed by the Court for him to pay. This sum was attached and withdrawn by a third party, who had a decree against the

(1) a.c. 80 P.L.R., 1901 (2) s.c., 179 P. L. R., 1901.

pre-emptor, and then upon vendee's claiming the land on the ground that he had received no money, the Court directed plaintiff to pay in Rs. 150 a second time. Plaintiff appealed against the order and failed in his appeal, and so came up to this Court on the revision side. It was contended that plaintiff had another remedy, inasmuch as *after* the order for fresh payment of Rs. 150, the first Court had passed a formal order (on date of expiry of period for payment), that the decree was null and void, and plaintiff could have appealed against that order. The contention was rightly repelled by the learned Judges, who, taking it as settled that they had *power* to interfere, held that the circumstances were of a special kind, and that "each case must be considered on its own merits."

In *Coates v. Kashi Ram and another* (76 P.R., 1903, (1)) this Court ruled that it is the general policy of the law, and the usual practice of the superior Courts, that the latter should interfere on the revision side, "only in those cases where there is no other remedy, or the remedy is so cumbrous or expensive that to refer the applicant to it is tantamount to denying him relief."

In *Parmanand v. Municipal Committee, Lahore*, 65 P. R., 1905 (2) Reid, J., held that where an executing Court passes an order under Section 295, Civil Procedure Code, with jurisdiction to do so, and in doing so is guilty of no "material irregularity," no revision lies under Section 70 (1) (a), Punjab Courts Act, inasmuch as the clause does not in terms apply; and that no revision lies under Section 70 (1) (b), because that applies only to "decrees" and an order under Section 295 is not a "decree." In the present case there probably was a "material irregularity" that is, if it could be held that the Court had simply overlooked Section 295 altogether. At all events, Reid, J., did not there decide whether, if Section 70 (1) (a) did in terms apply, he should elect to interfere.

In *Punjab National Bank v. Salamat Singh and others* (82 P. R. 1905 (3)), a single Judge of this Court, following 15 P. R. 1901, (4) and 8 P. R., 1903, (5) ruled that this Court should not revise where another remedy existed, and where the order in revision probably could not be final, a right to sue still remaining to the aggrieved party.

We do not think we need discuss the High Court rulings which have been quoted before us by Mr. Nanak Chand. The course of decision in this Court seems to us to provide an intelligible rule, and we lay it down, therefore, that this Court will not interfere on the revision side with

(1) s.c. 170 P.L.R. 1903. (2) s.c. 130 P.L.R. 1905. (3) s.c., 199 P.L.R., 1905. (4) s.c., 80 P.L.R., 1901 s.c. 31 P. L.R., 1903.

order under Section 295, Civil Procedure Code, save in, exceptional circumstances, and that we see in the present case no circumstances warranting interference.

We, therefore, dismiss the petition with costs.

Petition dismissed,

REVISION SIDE

No. 120.

CIVIL,

Before Mr. Justice Robertson and Mr. Justice Kensington.

RAJ SARUP, —(PLAINTIFF)— PETITIONER,

versus

HARDAWARI, —(DEFENDANT), —RESPONDENT.

CASE No. 84 OF 1905.

Punjab Tenancy Act (XVI of 1887), Sections 77 (3) (j) & 100 — Jurisdiction of Civil and Revenue Courts — Kudhi kamini. Suit for recovery of — Suit triable by Revenue Court tried by Small Cause Court—Decree cannot be registered under Section 100, Tenancy Act.

Held, that *kudhi kamini* (hearth cess) is a village cess within the meaning of Section 77 (3) (j) of the Punjab Tenancy Act; and that a suit for recovery of such dues is excluded from the jurisdiction of the Civil Courts.

When a suit triable by a Revenue Court has been tried by a Small Cause Court, the decree passed in the suit cannot be registered under Section 100 of the Punjab Tenancy Act.

Petition for revision of the order of Lala Ude Ram, Munsif, Rohtak dated 19th November 1904.

Mr. Lakshmi Narain, Advocate for Petitioner.

JUDGMENT.

KENSINGTON, J.— (5th April 1907.)— In the Case a suit for recovery of certain *kudhi kamini* dues has been decided by a Small Cause Court. The question before us is whether such suit would lie in a Civil or a Revenue Court.

We take the term *kudhi kamini* to mean a hearth cess and to be the equivalent of the door cess or *haqq-buha* of Districts in the Western Punjab, see paragraph 94 of Mr. Douie's Settlement Manual for the Punjab.

Following the decision given in *Fazal v. Samandar Khan* (49 P. R. 1891) and in *Gawhra v Ali Gauhar* (11 P. R., 1890, Rev.) and an unpublished judgment of this Court dated 8th March 1905, on Civil Reference No. 11 of 1904 (Published as note to this case) we hold that *Kudhi Kamini* is a village cess within the meaning of section 77 (3) (j) of the Punjab Tenancy Act and that a suit for recovery of the dues is excluded from the jurisdiction of the Civil Courts.

We are unable to rectify the error by registering the decree of the Lower Court as a Revenue Court decree under section 100 of the Tenancy Act, as the suit has been dealt with by an officer exercising Small Cause Court powers. We must, therefore, accept the application for revision, set aside the proceedings of the Lower Court on the ground that the Court had no jurisdiction, and direct that the plaint be returned to the plaintiff for presentation in the Revenue Court of an Assistant Collector of the 1st grade.

No order as to costs in this Court. The plaintiff-petitioners are responsible for their own mistake and the defendant-respondent has incurred none.

NOTE.— The following is the unpublished case referred to the above case.

REFERENCE SIDE.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington

SHAHYA AND OTHERS,—(DEFENDANTS,—APPELLANTS.

versus

KARM KHAN AND OTHERS,—(PLAINTIFFS)—RESPONDENTS.

CIVIL REFERENCE No. 11 of 1904.

Case referred by Major O P. Egerton, Deputy Commissioner, Rawalpindi.

Mr. Nanak Chand, Advocate, for Appellants.

JUDGMENT.

KENSINGTON, J.—(8th March 1905).—The term *haq buha*, which forms the subject matter of the suit before us, is explained in paragraph 143 of the Rawalpindi Final Settlement Report of 1887

It has been held both by this Court *Fazal v. Samandar Khan* (49 P. R. 1891) and by the Financial Commissioner *Gowhra v. Ali Gauhar* (11 P. R. 1890, Rev.), that Customary dues of this nature, levied by the proprietary body of a village from non-proprietary residents, fall within the definition of village cess contained in clause (12) of Section 4 of the Tenancy Act. Suits for recovery of these dues are therefore cognizable by the Revenue Courts under section 77 (3) (j) of the Act.

It follows that under the ruling in *Bahadur Khan v. Sardar* (89 P. R. 1895), with which we agree, the present suit has been correctly instituted in a Revenue Court, though brought for a declaration in regard to the dues under Section 45 of the Land Revenue Act. We do not think that there is any serious conflict between the ruling last quoted and that contained in *Raja Nur Khan v. Musmmat Darab Khatun* (25 P. R. 1889), which dealt with a different matter and was strictly confined to the case then before the Court. It does not follow that because a Civil Court can enter a declaratory suit in regard to title as entered in the record-of-rights, it will, therefore, have jurisdiction in declaratory suits of a different nature, covering matters specifically referred to in Section 77 of the Tenancy Act.

Our reply to the reference is that the Revenue Courts in this case have jurisdiction and that the appeal should be heard by the Collector. We make no order as to Costs.

APPELLATE SIDE.

No. 121.

CIVIL.

Before Mr. Justice Robertson.

RAM GOPAL, (DECREE-HOLDER,)—(PLAINTIFF),—APPELLANT,

versus

TEJA SINGH, (JUDGMENT-DEBTOR,)—(DEFENDANT),—RESPONDENT.

CASE No. 1162 OF 1907.

Civil Procedure Code (Act XIV of 1882), Section 230—Execution of decree—Limitation—Decree for money.

A decree for recovery of money by sale of specific property is a decree for money within the meaning of Section 230 of the Civil Procedure Code. *I. L. R.*, XXVIII Mad., 224, 473 followed. *I. L. R.*, XVI All., 418, XXV All., 541 XXIV Cal., 473, XXV Cal., 580, XXVII Cal., 285 not followed.

Miscellaneous further appeal from the order of S. W. Gracey, Esquire, Divisional Judge, Amritsar Division, dated the 4th June 1907, reversing that of Lala Daswandhi Ram, Subordinate Judge, 1st Class, Amritsar, dated the 4th March 1907, holding that the decree is within time.

Lala Hukam Chand, Pleader, for Appellant.

Pandit Sheo Narain, Pleader, for Respondent.

JUDGMENT.

ROBERTSON, J.—(20th February 1908).—The only question before me is.—Is the decree in question “a decree for money” within the meaning of Section 230, Civil Procedure Code? The decree runs as follows:—

“It is ordered that Teja Singh, the defendant, do pay to the plaintiff the sum of Rs. 1,528-8-0 as charge on the mortgaged property, and do also pay to the plaintiff the costs of this suit, as taxed by the officer of the Court and noted below, amounting to Rs. 182-8-0. The decree not to be executed for two months from date, after that date if decree is not paid the mortgaged property will be forthwith put up to sale and the decree will be satisfied from the sale proceeds. Any balance, if still due to plaintiff, to be paid by defendant personally.”

Now it appears to me that a “decree for money” is equally a decree for money whether or not any special means are provided in the decree for the realization of that money. Under this decree or

any similar decree the decree-holder can take nothing from the judgment-debtor, but a sum of money. That sum may be recoverable from certain specific property, but the advantage which the decree-holder is to receive is simply the payment of so much money and the decree is in its essence a decree for money. It can obviously be satisfied without any further proceeding than the payment of money. The Madras High Court has taken this view in more than one judgment (*see I. L. R., XXVIII Mad.*, page 224, page 473), and the matter has not been discussed from this point of view in the Calcutta and Allahabad rulings relied on (*I. L. R., XVI, Allahabad*, page 418; *XXV Allahabad*, page 541; *XXIV Calcutta* page 473; *XXV Calcutta*, page 580; *XXVII Calcutta*, page 285). There is no authority of this Court on the point so far as I know. In other provinces also the matter may be complicated by Section 88 of the Transfer of Property Act which is not in force in this province. I think the decree in question is a decree for money and so far the appeal is dismissed.

But it is contended that even as a decree for money the application is not time-barred, and these points have not been decided by the lower Courts, which will now decide on any other points which arise for decision.

The appeal is dismissed accordingly on the particular point before me, but the case is returned to the lower Appellate Court for decision upon the other points which have not been dealt with. Costs to be costs in the proceeding.

Appeal dismissed.

APPELLATE SIDE.

No. 122.

CIVIL.

Before Sir William Clark, Kt. Chief Judge, and Mr. Justice Reid.

ABAS ALI SHAH,—(DEFENDANT),—APPELLANT,

versus

SHER ZAMAN,—(PLAINTIFF),—RESPONDENT.

CASE No. 1035 OF 1906.

Punjab Pre-emption Act (II of 1905, Local), Sections 28, 29—Pre-emption—Limitation—Claim as collateral and co-sharer.

The plaintiff brought his suit for possession of land by right of pre-emption on the 6th January 1906, in respect of a sale held on the 7th January 1901. The mutation of names had taken place on the 31st December 1901. It was alleged that the plaintiff was a co-sharer with his father, who was still alive,

the father having given him a third of his holding, and that the plaintiff as son of his father was a collateral of the vendor under Pre-emption Act II of 1905.

Held, that Pre-emption Act II of 1905 was applicable to the case and that as mutation of names had taken place in 1901 the claim was barred under Section 29 of the Act as far as regards his claim based in Section 12 of the Act as a collateral of the vendor, but that as regards his claim as a co-sharer the claim was based under the old Act, and his right, if any, accrued to him under that Act, and under Section 28 of the Act of 1905 plaintiff had a year from the commencement of the Act, 11th May 1905, within which he could sue.

Miscellaneous further appeal from the order of Lala Achhru Ram, Divisional Judge, Jhelum Division, dated 14th August 1906.

Mr. Nanak Chand, Advocate for Appellant.

JUDGMENT.

CLARK, C. J. (27th May, 1907).—The sale of agricultural land on which pre-emption is claimed took place on 7th January 1901, and mutation of names took place on 31st December 1901.

This pre-emption suit was filed on 6th January 1906, and was based on two grounds; (1) that plaintiff was a co sharer with his father, still alive, his father having given him a third of his holding; (2) that plaintiff as son of his father was a collateral of the vendor under Pre-emption Act II of 1905. The first Court dismissed suit on ground of plaintiff's having no right of pre-emption. The Divisional Judge held that the claim was governed by the new Pre-emption Act, and plaintiff had a right of pre-emption and remanded the case for disposal under Section 562, Civil Procedure Code.

On appeal it is urged before us that the claim is not governed by the new Act, that Section 2 (3) of that Act says that it "shall apply to every claim to the right of pre-emption whether that right has accrued before or after its commencement," that in this case the right had accrued neither *before nor after the commencement*, but was *created* by the provisions of the Act itself.

We think that is a strained and unsound interpretation of the language. The Act is intended to apply to every claim to the "right of pre-emption," and the words "whether that right has accrued before or after the commencement" only amplify this meaning. A right created by the Act may, we think, also be held to have accrued after the commencement of the Act.

The Divisional Judge was therefore right, in our opinion, in holding that the Pre-emption Act of 1905 applies to this case.

Plaintiff therefore had a right of pre-emption, and the question now is whether it is barred by limitation. As mutation of names took place in 1901 the claim is barred under Section 29 of the Act as far as regards his claim based under Section 12 of the Act, as a collateral of the vendor.

As regards his claim as a co-sharer, that claim was based under the old Act, and his right, if any, accrued to him under that Act, and under Section 28 of the Act of 1905 plaintiff had a year from the commencement of the Act, 11th May 1905, within which he could sue. The Divisional Judge has not dealt with this part of the claim.

We accept the appeal and set aside the order of remand under Section 562, Civil Procedure Code, and direct the Divisional Judge to dispose of plaintiff's appeal as far as it is based on the Pre-emption Law prior to the Act of 1905.

Court-fee on this appeal will be refunded : other costs will be costs in the case.

Appeal accepted.

APPELLATE SIDE.

No 123.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

THAKAR DAS AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

versus

SOHAWA SINGH,—(PLAINTIFF),—RESPONDENT.

CASE No. 643 OF 1907.

Punjab Pre-emption Act (II of 1905, Local), Sections 3 (1), 4, 5, 11, 12, 29 (c)—Sale by a person who is not member of an agricultural tribe—Right of proprietor in the village.

The plaintiff, a member of an agricultural tribe, sued for pre-emption on a sale of certain land by a person who was not a member of an agricultural tribe to a vendee who was a proprietor in the village but did not come within the purview of the proviso to Section 11 of the Punjab Act II of 1905.

Held, that the plaintiff having a better right the claim was valid.

Further appeal from the decree of S. W. Gracey, Esquire, Additional Divisional Judge, Ferozepore Division, dated 7th March 1907.

Mr. Shelverton, Advocate, for Appellants.

Mr. Ram Bhaj Datta, Pleader, for Respondent.

JUDGMENT.

KENSINGTON, J.—(25th November 1907).—In this case certain land has been sold by a vendor who is not a member of an agricultural tribe to a vendee who is a proprietor in the village, but who does not come within the purview of the proviso to Section 11 of the Punjab Pre-emption Act II of 1905. The lower Courts have concurred in allowing a claim to pre-emption by a member of an agricultural tribe, and the vendee comes before us on further appeal. By caste the vendor is a *Tarkhan*, the vendee an *Arora*, and the plaintiff-pre-emptor a *Jat*.

The argument on the vendee's behalf follows the line of discussion of the words "subject to the provisions of Section 11," with which Section 12 begins, as set out on pages 74 and 75 of Mr. Shadi Lal's recently published second edition of his commentary on the Act. We need not repeat the argument at length, but we observe that it proceeds on an assumption that the ruling in *Mahmud v. Nur Ahmad and another*, 101 *P.R.*, 1907 s.c., *P.W.R.*, 70 of 1907 should not be followed. Put shortly, the point urged is that a vendee is not obliged to comply with the requirements of the proviso to Section 11 in order to defeat a claim for pre-emption in the case when the sale to him is not opposed to the provisions of the Land Alienation Act.

In this connection we find that the allegation made in the second ground of appeal, that the sale in question was made after the vendee had obtained the Deputy Commissioner's sanction under Section 3 of the Land Alienation Act, is incorrect. The vendee, no doubt, applied for sanction, but the Deputy Commissioner rightly ordered that no sanction was required as the case was not one of those provided for by subsection (1) of Section 3. The case now before us must be determined by the terms of various sections of the Pre-emption Act alone, and in particular by Sections 3 (1), 4, 5, 11 and 12. These have been discussed in detail in *Mahmud v. Nur Ahmad*, 101 *P.R.*, 1907; s.c., *P.W.R.*, 70 of 1907 and it is unnecessary to cover the same ground again, as we are unable to see that any sound argument is advanced for arriving at a different conclusion. Section 20 (c) has here no application as a valid sale could have been made to the plaintiff without the Deputy Commissioner's sanction.

It appears to us that the vendee can give no answer to the plaintiff's contention that he has a clear preferential right under the Act as drawn. The vendee may be quite within his rights in purchasing, but he cannot retain the bargain if some one comes forward with a better right. If he is protected by the proviso to Section 11 well and good, otherwise he runs the risk of some one coming forward with a better right under Section 12. The plaintiff here undoubtedly has a pre-emptive right under Section 12, and it follows that his right will be preferential over that of the vendee. The case is not the same as that stated in *Mahmud v. Nur Ahmad*, 101 P. R., 1907; s. o, P. W. R., 10 of 1907, but the line of argument is the same so far as concerns the construction of Sections 11 and 12 of the Act.

The proposition which the vendee-appellant wishes us to lay down is that though he may not himself have been able to sue for pre-emption because not qualified by the proviso to Section 11, he can nevertheless resist the claim of a man who has a pre-emptive right, on the ground that the law does not disqualify him from purchasing. We regard this proposition as untenable. The essence of pre-emption is that the right-holder has a better claim than some one else. If he can establish that claim he is bound to succeed, and it is no answer to the suit that the original vendee also has certain rights of his own. Sections 11 and 12 of the Act appear to us to have been effectually drawn in such a way as to secure that lands which had previously passed into the hands of persons not belonging to the privileged class of agricultural tribes shall, under certain circumstances, revert to members of the privileged class if they choose to exercise their legal rights. With the ethics of this arrangement we have no concern whatever. What we are bound to do is to construe the Act as it stands, and we do not ourselves entertain any doubt as to what the construction should be in the present case. It has been correctly given by the lower Courts, and we must dismiss the appeal with costs to the pre-emptor-plaintiff.

Appeal dismissed.

APPELLATE SIDE.

No. 124.

CIVIL.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

SHIB DIAL,—(PLAINTIFF),—APPELLANT,

*versus***Mussammat CHIRAGH BIBI AND OTHERS.—(DEFENDANTS),—RESPONDENTS.**

CASE NO. 338 OF 1907.

Jurisdiction of Civil and Revenue Courts—Occupancy tenant—Ejectment by Revenue Court from land not included in the tenant's holding—Suit for recovery of possession by tenant—Res-judicata.

The plaintiff took some land on lease from the defendants who sued for his ejectment in a Revenue Court and obtained a decree which included the land now in dispute. He was ejected in execution. In the present suit he alleged that the land in suit was included in the Revenue Court's decree by mistake and without his knowledge, and that it was not included in the land leased to him. He stated that he had become owner of the land by adverse possession and claimed its possession.

Held, that the suit was exclusively cognizable by Civil Court, and that the decree of the Revenue Court was by reason of that Court's inability to entertain the present suit no bar under Section 13 of the Civil Procedure Code to the hearing of the present suit.

Further appeal from the order of H. P. Tollinton, Esquire, Divisional Judge, Lahore Division, dated the 12th February 1907, reversing that of Munshi Miran Bakhsh, Munsif, 1st Class, Lahore, dated the 9th January 1906, decreeing the claim.

Mr. Sukh Dial, Advocate, for Appellant.

Mr. Obedulla, Pleader, for Respondent.

JUDGMENT.

REID, J. (28th March 1908).—The plaintiff-appellant sued for possession of 8 *kanals* 6 *marlas*, alleging that he was occupancy tenant of 6 *kanals* 18 *marlas* belonging to the defendants-respondents, and had become proprietor of the remaining 1 *kanal* 8 *marlas* by long adverse possession.

He took some land on lease from the respondents, who sued for his ejectment in a Revenue Court, and obtained a decree, which included the land in suit in the land from which the appellant was to be ejected. He was ejected, accordingly, in execution. In the present suit he alleged that the land in suit was included in the Revenue Court's decree by mistake and without his knowledge, and that it was not included in the land leased to him. The Court of first instance gave him a decree, and the lower Appellate Court set aside this decree and

dismissed the suit, on the ground that the suit constituted an appeal from a decree of the Revenue Court and was not cognizable by a Civil Court.

The sole questions for consideration are whether the jurisdiction of the Civil Courts has been ousted by the Tenancy Act and whether Section 13 of the Code of Civil Procedure bars the suit.

In 44 *P. R.*, 1891, at pages 238-9, Plowden, Senior Judge, said: "The test under the Tenancy Act, whether a person has or has not become a tenant (with or without a right of occupancy) is whether such person having the right to enter upon and possess particular land, has or has not entered into possession in pursuance of that right. If such person has entered, he is a tenant. If, after he has entered, his title to a right of occupancy is in dispute, then a suit by him to establish it, or by the landlord to disprove it, falls under clause (d) of Section 77, and is cognizable by a Revenue Court."

"If, having entered, he is wrongfully dispossessed, he does not cease to be a tenant, and may bring the suit described in clause (g) of Section 77, as a suit under Section 50 for recovery of possession, cognizable by a Revenue Court."

"If such person has not entered, his suit for entry into possession, whether he claims a right of occupancy or not, is not cognizable by a Revenue Court, but by a Civil Court only."

In 44 *P. R.* 1891 (Full Bench) the plaintiffs, claiming that they were occupancy tenants dispossessed by their landlord more than a year before suit, sued for possession of their occupancy holding. The Court considered the ruling above cited and held that, for the purposes of the Tenancy Act, a tenant who had been dispossessed could for the period of one year from the date of his dispossession, claim to be still regarded as a tenant, *quo ad* his landlord, his suit for recovery of possession being (as expressly provided) cognizable by the Revenue Court: that if he allowed the period of one year to elapse without making any claim, he must be taken (subject to any recognized disability) to have relinquished his right to be still regarded as a tenant, and that his remedy (if such still existed, as to which it was not necessary to give an opinion upon the reference to the Full Bench), must be sought in the Civil, not in the Revenue Court; that the suit was consequently cognizable by the Revenue Court, it being no longer possible to describe the suit as one between the tenant and landlord. In 3 *P. R.*, 1895, it was pointed

out that, reading Sections 42, 43, 44, 45, 77 (3) (f) of the Tenancy Act together, it was open to any one to assume the status of landlord in respect of any particular land occupied by any other person and to apply for that person's ejectment as his tenant, and that that person would be ejected if he did not sue to contest the notice of ejectment or failed in such suit.

In 64 *P. R.* 1898 it was held that section 50 of the Tenancy Act did not restrict the period of limitation for a suit in the Civil Courts by a dispossessed occupancy tenant for possession. The Court set aside the lower Appellate Court's finding that the suit was barred by limitation and decreed the suit.

The conclusion to be drawn from these authorities is that the Revenue Court which decreed the appellant's ejectment had not jurisdiction to entertain the suit now filed by the appellant which is exclusively cognizable by the Civil Courts. 140 *P. R.*, 1906,⁽¹⁾ and *Banwari Lal* versus *Mussammatt Gopi*, *I. L. R.*, XXX All., 44, cited for the respondents, do not help them. In the former it was unnecessary to consider the questions now involved and they were not considered. The latter turned on a local statutory provision limiting the period for a suit in a Civil Court for the determination of a question of title, and is not in point.

No. 68 *P. R.*, 1901⁽²⁾; *Gangaraju* versus *Kondireddiswami*, *I. L. R.*, XVII Mad., 106, and *Gomti Kunwar* versus *Gudri*, *I. L. R.*, XXV All., 138, are ample authority for the conclusion that the decree of the Revenue Court was by reason of that Court's inability to entertain the present suit, no bar, under section 13 of the Code of Civil Procedure, to the suit proceeding.

We decree the appeal, set aside the decree of the lower Appellate Court, and, under section 562 of the Code of Civil Procedure, remand the appeal to the lower Appellate Court for decision.

Court-fee on the memorandum of appeal will be refunded, and other costs of this Court will be costs in the cause.

Case remanded.

(1) s. c., 95 *P. L. R.*, 1907.

(2) s. c., 170 *P. L. R.*, 1901.

APPELLATE SIDE.

No. 125.

CIVIL.

Before Mr. Justice Reid.

GANGA RAM,—(PLAINTIFF),—APPELLANT,

versus

Mussamat DURGI,—(DEFENDANT),—RESPONDENT.

CASE No. 1447 OF 1907.

Limitation Act (XV of 1877), Schedule II, Article 179—Execution of decree—Limitation—Application in accordance with law—Notice issued to judgment-debtor in execution of an application not in accordance with law.

The plaintiff obtained a decree to the effect that according to the compromise between the parties the defendant shall mortgage certain land to the plaintiff in lieu of a certain sum of money, within one month from the date of the decree. The mortgage was not executed. Within three years of the decree, the decree-holder applied for execution by being placed in possession of the land specified, and on the same date notice issued to the judgment-debtor under Section 248 of the Civil Procedure Code to show cause against execution issuing.

It was held that the decree-holder was not entitled to possession under the decree. The decree-holder withdrew his application, and subsequently applied under section 260 of the Civil Procedure Code for arrest of the judgment-debtor and attachment of her moveables after the expiry of more than three years from the date of the decree.

Held, that the later application was barred by limitation and that it was not saved by the previous application, for it was not in accordance with law, and that the payment of any process-fee did not improve the position of the decree-holder.

Miscellaneous further appeal from the order of Lala Harnam Das, District Judge, Gurdaspur, dated 20th March 1907, reversing that of Faqir Sayad Said-ud-Din, Munsif, 2nd Class, Pathankote, District Gurdaspur, dated the 10th January 1907, directing the issue of a warrant for the attachment of the judgment-debtor's movable property and for her arrest.

Mr. Sukh Dial, Advocate, for Appellant.

Lala Balwant Rai, Pleader, for Respondent.

JUDGMENT.

REID, J. (28th March 1908.)—The decree of which execution is sought is in the following terms:—"according to the compromise between the parties the defendant. . . shall mortgage 15 *ghumaos* of land in her

"possession at Rajpura to the plaintiff. . . . in lieu of Rs. 384-0-0
"plus Rs. 30-8-0 costs, within one month from the date of compromise."
The mortgage was not executed.

On the 16th May 1903, within three years of the decree, the decree-holder applied for execution by being placed in possession of the land specified, and on the same date notice issued to the judgment-debtor under Section 248 of the Code of Civil Procedure to show cause against execution issuing, and was served on the 20th May. On the 28th October 1903 the judgment-debtor's objections were overruled and a warrant for possession issued, and on the 10th November 1903 process fee for delivery of possession was paid into Court by the decree-holder.

The judgment-debtor appealed the order of the 28th October, and the Appellate Court remanded under Section 562 of the Code of Civil Procedure on the 4th May 1904.

The order of remand was appealed, and this Court set it aside on the 3rd July 1906 on the ground that it was illegal, no finding having been recorded by the Lower Appellate Court on any point decided by the Court of First Instance, and Section 562 being inapplicable. On the 25th July 1906 the Lower Appellate Court set aside the order of the 28th October 1903, holding that the decree-holder was not entitled to possession, no mortgage having been executed and the terms of the mortgage deed not having been settled.

The record was returned to the Executing Court and the decree-holder did not appeal, but on the 25th August 1906, withdrew his application of May 1903, expressing his intention to apply again, and on the 28th August 1906 he applied under Section 260 of the Code for arrest of the judgment-debtor and attachment of her movables.

The question for consideration is whether this application was within limitation.

The authorities cited are :—

For the appellants, *Dhonkal Singh versus Phakkar Singh*, I.L.R., XV All., (Full Bench) 84 ; *Norendra Nath Pahari versus Bhupendra Narain Roy*, I.L.R. XXIII Cal., 374; *Chowdhry Paroosh Ram Das versus Kali Puddo Banerjee*, I. L. R., XVII Cal., 53 ; *Maneklal Jagjivan versus Nasia Raddha*, I. L. R., XV Bom., 405 ; 22 P. R., 1905,⁽¹⁾ and 116 P. R., 1907 ;

(1) s. c., 57 P. L. R., 1905.

For the Respondents, *Chattar versus Newal Singh*, I.L.R., XII All., 64; *Pandari Nath Bapuji versus Lila Chand Hatibhai*, I. L. R., XIII Bom., 237; *Bhagwan Jethi Ram versus Dhoudhi*, I.L.R., XXII Bom., 83; and 98 P. R. 1901⁽¹⁾.

The XV Allahabad case does not help the appellant. Notice under Section 248 of the Code doubtless gave a fresh starting point, but the application for execution now under consideration was made more than 3 years after the date of the notice and the authority cited did not decide that issue of notice cured the invalidity of the application for execution, and caused that application to be "in accordance with law."

The XXIII Calcutta case does not help the appellant because therein an acknowledgment had been made by the debtor and process fee for sale proclamation had been paid by the decree-holder within three years of the application for execution. The finding that the admission and registration of the application alleged to be barred precluded the debtor from objecting to the validity of the proceedings does not affect the present case, inasmuch as the debtor here, far from accepting the order, successfully appealed against it. In *Mungul Pershad Dichit versus Grija Kant Lahiri*, I. L. R., VIII Cal., (P. C.) 51, followed in XXIII Calcutta their Lordships of the Privy Council limited the rule to orders which were not reversed. In the XVII Calcutta and XV Bombay cases it was not held that an application for relief which the Court could not grant, was in accordance with law.

22 P. R., 1905⁽²⁾ and 116 P. R., 1907 do not go further than the XV All., case.

The XII Allahabad case is directly in point, the *dictum* being that "applying in accordance with law" means applying to the Court to do something which the Court is competent to do, and that an application to arrest a judgment-debtor who had previously been arrested in execution and was free from arrest under Section 341 of the Code of Civil Procedure, was not in accordance with law and did not afford a fresh starting point for limitation. The XIII Bom., case is to the same effect. In the XXII Bom., case it was held that the words "in accordance with law" in article 179 of the Limitation Act governed the words "to take some step-in-aid of execution" as well as the words "to the proper Court for execution."

In the P.R., 1901 case it was held that an application for execution, not in accordance with the decree, was not "a step-in-aid" within the terms of article 179 (4).

(1) S. C., 61 P. L. R., 1901.

(2) S. C., 57 P. L. R., 1905.

I see no reason for holding that an application for permission to pay a fee for a process not authorised by the decree and consequently not "in accordance with law" is any more "in accordance with law" than the application for that process to be issued, and in my opinion, the fact that the original application was not in accordance with law necessitates the conclusion that the ancillary application is not in accordance with law and that the payment of the process fee does not improve the position of the decree-holder. Section 14 of the Limitation Act does not help him. The reason for the rejection of the application for execution was not that the Court was unable from defect of jurisdiction, or other cause of a like nature, to grant it, but that the application was not in accordance with the decree.

The appeal therefore fails, and is dismissed; but, having regard to the fact that the application in accordance with law now under consideration would presumably have been made within limitation had the Lower Appellate Court instead of making an illegal order of remand, at once disposed of the application for execution, and to the fact that the judgment-debtor failed to comply with the decree, I leave the parties to pay their own cos's of the execution proceedings.

Appeal dismissed.

APPELLATE SIDE.

No. 126.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

RALLA, AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

versus

AMIN CHAND, AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 238 OF 1906.

Mortgage—Redemption—Onerous condition—Condition as to mortgage being not redeemable for 60 years enforced.

The mortgagor specifically agreed with the mortgagee that he should not be entitled to redeem until after the expiry of 60 years. The purchaser of the mortgaged property from the mortgagor sued for redemption and contended that the condition as to redemption was so inequitable and onerous that relief from it should be given on equitable grounds and it should be struck out.

Held, that the contention was not valid and redemption could not be allowed to the plaintiff before the expiry of the stipulated period.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Jullundhur Division, dated the 11th August 1905, affirming the order of Lala Topan Ram, Munsiff, 1st Class, Jullundhur, dated the 21st July 1905, dismissing plaintiff's claim.

Mr. Shadi Lal, Advocate, for Appellants.

Mr. Oertel, Advocate, and Pandit Sheo Narain, Pleader, for Respondents.

JUDGMENT.

ROBERTSON, J. (22nd April 1907).—The facts necessary to bear in mind in deciding this appeal are as follows :—

Milkhi Ram, *Jat*, father of defendant No. 1 Bujha, mortgaged 39 *kanals* 5 *marlas* to one Amin Chand, defendant No. 2, for Rs. 500, on 8th December 1891.

Milkhi Ram had also mortgaged 86 *kanals* to one Duni Chand.

In order to redeem these two mortgages the defendant No. 1 sold 97 *kanals* odd to plaintiffs for Rs. 1,000 Plaintiff was to pay off the mortgages and hand over 25 *kanals* 14 *marlas* free of encumbrance to the defendant No. 1. The mortgage of Duni Chand was duly redeemed. But when plaintiff sought to redeem the mortgage of Amin Chand, his right to redeem was denied, and it was urged that in mortgage-deed of 8th December 1891 Milkhi Ram had specifically contracted that he should not be entitled to redeem until after the expiry of 60 years. It is not contended that there is any ambiguity about this condition, but it is urged that there is no specific clause which prevents the mortgagee from enforcing his rights to recover his money and so that the condition is without consideration, and further that being a clause which clogs the right of redemption it should be struck out. It is also urged that it is so inequitable and onerous that relief from it should be given on equitable grounds.

As regards the first point we agree with the view expressed in *I. L. R.*, XX Bom., page 677, that when there is a clause forbidding redemption within a certain period and no clause specifically enabling the mortgagee to enforce his rights at an earlier date, it must be held the two periods are intended to be conterminous.

As regards the objections that the clause clogs the right of redemption it may be replied that it does not clog it, but merely postpones the date on which that right may be exercised. And it is pointed out in *I. L. R.*, XX

Bom., page 677, that it has never been held that a clause in a contract, which postpones the date on which redemption may be claimed is bad *per se* merely on account of the length of the term fixed. No doubt deductions as to other considerations may be drawn from the length of the period, but *per se* such a contract has never been held to be bad merely on account of the length of the time.

Here a purchaser, not the original mortgagor, is trying to get relief from a clause postponing redemption in a mortgage-deed affecting the land which has been purchased, a clause of which he was, it is not denied, fully aware when he made the purchase. There do not appear to us to be any equities in his favour. After hearing counsel on both sides and consulting the authorities * quoted to us on each side, we consider that the appeal must fail, and it is dismissed with costs accordingly.

Appeal dismissed.

REVISION SIDE.

No. 127.

CIVIL.

Before Mr. Justice Reid.

TANNU LAL AND OTHERS,—(PLAINTIFFS),—PETITIONERS.

versus

BEHARI LAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1616 OF 1907.

Limitation—Suit for compensation for non-delivery of goods—Effect of special clause that claim would not be recognized if not made within certain period from due date of draft.

The plaintiffs, indentors, sued the defendants for compensation for non-delivery of goods. A condition of the indent was that "no claim or dispute of any sort whatever can be recognized if not made in writing within 60 days from due date of draft." No draft was drawn, for the goods indented were never delivered.

Held, that the condition was inapplicable to the case, for no bill of lading had been sent and no draft had been drawn. It could not be held that the words "due date of draft" mean 'the date on which draft drawn for goods shipped, had shipment been effected, would have fallen due.'

* 6 P. R. of 1902, s. c., 154 P. L. R., 1901, XX Bom., 677, XXI Mad., 110; 131 P. R., 1894, XXVII Bom., page 154; 201 Civil Appeal of 1889, X All., page 602, XXVI All., 479, XXVII Mad., pages 26 and 479; Civil Appeal 11 of 1899 (decided 5th October 1902).

Petition under Section 25 of Act IX of 1887, for revision of the order of Khawaja Tasaddug Hussain, Judge, Small Cause Court, Delhi, dated the 8th July 1907, dismissing plaintiff's claim.

Mr. Shadi Lal, Advocate for Petitioners.

Pandit Ram Bhaj Datta, Pleader for Respondents.

JUDGMENT.

REID, J.—(18th December, 1907).—The Court below has dismissed the suit solely on the ground that it was barred by limitation under clause 14 of the indent, which runs as follows:—"No claim or dispute of any sort whatever can be recognized if not made in writing within 60 days from due date of draft."

The goods indented for were never delivered and no draft was drawn for them.

One of the plaintiff-indentors examined as defendants' witness, stated that due dates of drafts would be 30 days after arrival of *hundis*; that July shipment could be shipped by 7th August at the latest, that had the goods been shipped on 7th August, draft would have reached Delhi by 27th August and would have been due on the 27th September. The Court below appears to have treated this statement as implying that limitation ran only to the 27th November, applying clause 14 of the indent.

The chairman of the Delhi Mercantile Association deposed that clause 14 did not apply to non-delivery cases, and the deposition of the Secretary of the same Association was to the same effect, though not in the same words.

The suit was based on a surveyor's award of Rs. 181 damages to the plaintiffs, who notified defendants on the 16th January, 1907, that they have appointed a surveyor under clause 15 of the indent, and called on the defendants to appoint another surveyor.

Clause 14 of the indent is in my opinion inapplicable to this case, no bill of lading having been sent and no draft having been drawn.

Clause 1 of the indent provides for drafts "with all relative shipping documents attached", and I am unable to hold that the words "due date of draft" mean "the date on which draft drawn for goods shipped, had shipment been effected, would have fallen due."

I allow the application, set aside the decree of the Court below and remand the suit under Section 25 of the Small Cause Courts Act for disposal.

Costs of this Court will be the costs in the cause.

Petition allowed and cause remanded.

APPELLATE SIDE.

No. 128.

CIVIL.

Before Mr. Justice Shah Din.

KEHAR SINGH,—(PLAINTIFF),—APPELLANT,

versus

MAHMAN SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 831 OF 1902.

Pre-emption suit—Vendee owning land under a prior sale—Loss of the land under a pre-emption decree passed subsequently to institution of the suit.

Since the institution of the plaintiff's suit for pre-emption the vendees lost under a pre-emption decree the land which they had held in the village as purchasers under a prior sale, and which they claimed gave them pre-emption right equal to the plaintiff.

Held, that the effect of the decree was that the vendees could not be recognized as holding land on the date of the sale in dispute in the present case and the plaintiff's suit must be decreed. 46 P. R., 1902; s. c., 49 P. L. R., 1902, 98 P. R., 1902; 44 P. R., 1903; s. c., 75 P. L. R., 1903, 80 P. R., 1903, note, referred to.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Ferozepore Division, dated 30th July 1902.

Mr. Ganpat Rai, Advocate for Appellant.

Lala Durga Das, Pleader for Respondents.

JUDGMENT.

SHAH DIN, J.—(31st May, 1907).—The judgment in this case will also cover the connected Civil Revision No. 71 of 1903. No appeal lies as of right in this case as the value of the suit for purposes of jurisdiction is less than Rs. 1,000, and both the Courts below have concurred in dismissing the plaintiff's claim. I shall, however, treat the appeal as one admitted under Section 70 (1) (b) of the Courts Act. The facts are stated in sufficient detail in the judgments of the Lower Courts, and it is unnecessary to repeat them here.

The sole question for decision is whether the plaintiff has a right of pre-emption in respect of the sale in suit made to the vendees (defendants Nos. 2 to 4) by the vendor, defendant No. 1, on 8th November 1900. Both the Courts below have held that he has no such right on the grounds that the vendees are land-holders in the village in which the land is situate equally with the plaintiff, and that the fact of the latter being a co-sharer in the *shamilat* and of the vendees not being such co-sharers does not confer on the plaintiff a preferential right of purchase. In appeal it is contended that the first ground on which the plaintiff's suit has been dismissed by the Lower Courts, namely, that the vendees are landholders in the village and therefore equally entitled with the plaintiff to purchase the land in suit, no longer holds good, because since the institution of the present suit the vendees have lost the land which they then held in the village as purchasers under another and prior sale by reason of a suit for pre-emption having been successfully brought against them in respect of that sale by the present plaintiff. That being the case, it is argued that the plaintiff has a preferential right of purchase as regards the sale in dispute, inasmuch as the vendees are perfect strangers in the village, and have urged, and can urge, no other ground of equality with the plaintiff, pre-emptor. The facts which need be stated in connection with the point thus raised are briefly these :—

On 27th July, 1896, the vendee, Kishen Chand, defendant No. 2, purchased a plot of land, 51 *bighas* 10 *biswas kham* with certain appurtenant rights from one Sant Singh, and subsequently associated with himself in the purchase his brothers, defendants Nos. 3 and 4. Mutation was therefore effected in favour of all the three brothers. On 9th December, 1904, the present plaintiff, Kehr Singh, brought a suit for pre-emption in respect of the sale of 27th July 1896, which, after being hotly contested for three years, was ultimately decreed by this Court on 8th January, 1904. The present suit was instituted on the 29th October, 1904, a little over a month before the other suit above referred to, and though the fact of the institution of the second suit was specifically brought to the notice of the first Court, the latter did not await its final determination contenting itself with the remark that until that suit was decided against the vendees, defendants Nos. 2 to 4, they must for the purposes of the present suit be held to be landlords in the village. The first Court, therefore, dismissed the present suit on 22nd March 1902, and the dismissal was upheld by the lower Appellate Court on 30th July, 1902, on the ground set out above,

viz., that the vendees being proprietors in the village by reason of their purchase of 27th July, 1896, the plaintiff, who was also a proprietor, had as against the vendees no right of pre-emption in respect of the sale of 8th November, 1900. Upon the facts as stated above, the counsel for the plaintiff contends that the effect of the pre-emptive decree, which was passed by this Court on 8th January, 1904, was to divest the present vendees of their alleged ownership of land under the sale of 27th July, 1896, and to vest the same in the plaintiff-pre-emptor as from the date of the said sale; in other words, that by reason of the final decision of this Court the sale aforesaid must be considered as though it was made in favour, not of the vendees, but of the pre-emptor who steps into the shoes of the former and takes over the bargain of sale with all its incidents. In support of this contention, reliance is placed upon the decisions of this Court in *Hakam Singh v. Indar*, 46 P. R., 1902, ⁽¹⁾ and *Bogha Singh v. Gurmukh Singh*, 93 P. R., 1902, [p. 420, 2nd paragraph]. On the other hand, the pleader for the respondents strenuously argues that the sale of 1896 in favour of his clients not having been contested when the sale in dispute took place, or even when the present suit was brought, they must be held to have been landowners in the village at the date of the latter sale, and that as at that time they were entitled to purchase the land in suit in virtue of their status as landowners, they did not and could not forfeit their right of purchase by involuntarily parting with the land which was sold to them in 1896 after the institution of the present suit. *Muhammad Nawaz Khan v. Mussammat Bobo Sahib*, 44 P. R., 1903, ⁽²⁾ [p. 156], is cited in support of this contention.

After giving the matter my best consideration, I think that the argument of the appellant's counsel must prevail. The decision in *Muhammad Nawaz Khan v. Mussammat Bobo Sahib* was to the effect that a vendee-defendant having rights of pre-emption on the ground of vicinage does not forfeit them if he parts with his own property through which he had the said rights immediately after the purchase and can set up those rights in defence of his purchase. That decision is, however, clearly distinguishable from the present case, inasmuch as the house, by virtue of which the defendant-vendee in that case had a right of pre-emption, was held by him in full ownership under an indefeasible title not liable to be defeated at the instance of a pre-emptor, and the defendant parted with that house voluntarily after the institution of

(1) S. C., 49 P. L. R., 1902.

(2) S. C., 75 P. L. R., 1903.

the pre-emptor's suit, so that the title of the transferee dated from the time when the transfer was made to him and not from a date prior to the date of the pre-emption suit. On the other hand, the decisions relied upon by Mr. Ganpat Rai greatly strengthen his position. The ruling, however, most in point is that in *Bhupa v. Kori Mal*, 30 P. R., 1893 *note* not cited by the appellant's counsel, in which, under somewhat similar circumstances to those of the present case, Mr. Justice Riwarz laid down the law in the following terms at p. 168: "I am of opinion that our decision in No. 253 of 1892 has destroyed the appellants' rights as landowners in the village, and that it operates from the date of the sale in 1888, so that it may now be affirmed that, at the date of the present sales [which took place *after* 1888] the appellants were not landowners in the village. They were, at best, landowners with a defeasible title, any purchaser from whom would take with the risk of being dispossessed by a pre-emptor. We were asked to hold that the fact of the sales of 1888 not having been set aside when these suits were filed, stamps the appellants as *biswadars* of the village, and able to succeed on the strength of their proprietary rights, notwithstanding that those rights have now been transferred to the plaintiffs. I do not think that this would be good law, and it would open the door to all sorts of fraudulent devices for the purpose of evading the provisions of the law of pre-emption. For instance, a stranger purchases one *ghumaon* of land in a *bhayachara* village to-day. To-morrow he purchases half the village when claims for pre-emption are filed on account of both sales, he cheerfully relinquishes the one *ghumaon*, but successfully resists the claim to oust him from half the village, as he is found to have been the owner of one *ghumaon* in the village when the second sale took place and possibly also when the second suit was brought. This would be a regrettable result. I think that the appellants' claim to be considered *biswadars* of the village, for the success of their pleas in these cases, must be held to depend upon the final result of the other cases. I think the effect of a pre-emption decree is to vest the proprietary right in the pre-emptor from the date of the sale, which was a transaction voidable at the option of the pre-emptor. When the option is exercised the sale, as regards the original purchaser, becomes void *ab initio*."

These characteristically lucid observations of Mr. Justice Riwarz apply with double force to the present case, and I need hardly refer to or discuss other authorities which tend to support the same view.

I hold, therefore, that at the time of the sale in dispute the vendees were not landholders in the village in which the land is situate, and that consequently the plaintiff had a superior right of pre-emption. I set aside the decree of the lower Appellate Court and remand the case under Section 562, Civil Procedure Code, for decision on the merits. The stamp on this appeal will be refunded; other costs will be costs in the cause.

Appeal allowed, cause remanded.

Full Bench.

APPELLATE SIDE.

No. 129.

CIVIL.

Before Mr. Justice Reid, Mr. Justice Rattigan, and Mr. Justice Lal Chand.

ABDUL RAHMAN,—(PLAINTIFF),—APPELLANT,

versus

CHARAG DIN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 278 OF 1907.

Jurisdiction—Valuation of suit—Appeal—Further appeal—Claim for possession of house—Decree on payment of certain sum for improvements—Court Fees Act (VII of 1870), Sections 7 V (e), 9.

In a suit for possession of a house the plaintiff is bound to state market value of the house and he must pay Court-fee on the value stated by him. When it appears to it or the defendant pleads that the plaintiff has underestimated his claim, the Court ought to take immediate steps under section 9 of the Court Fees Act for ascertaining the market value and order deficiency in Court-fee to be made up, if enquiry shows that the value has actually been underestimated by the plaintiff. The value fixed by the plaintiff is a tentative one, and it is the value found by Court, and not that stated by the plaintiff, that governs the jurisdiction of the original Court. Where it exceeds the jurisdiction of the Court, the Court must return the plaint for presentation to proper Court, at whatever stage of the suit the true value may be determined by it. Similarly the Appellate Court has no jurisdiction to adjudicate on the appeal when it finds that the value of the suit exceeds its pecuniary jurisdiction.

The plaintiff sued for possession of a house which he valued at Rs. 90 in the Court of a *Munsif* of the 1st Class, and obtained a decree for possession on payment of Rs. 634-7-0, value of improvements to the house by the defendant. He appealed to the District Judge against so much of the decree as awarded compensation for improvements, and the District Judge held that he had jurisdiction to hear the appeal.

Held, by the Full Bench, that the District Judge had no jurisdiction to entertain the appeal.

Petition for revision of the order of B. H. Bird, Esquire, District Judge, Amritsar, dated 15th November 1906.

ORDER OF REFERENCE TO FULL BENCH.

REID, J.—(9th May, 1907).—The petitioner sued for possession of a house which he valued at Rs. 90 in the Court of a *Munsif* of the 1st Class and obtained a decree for possession, on payment of Rs. 634-7-0, value of improvements to the house by the defendant. He appealed to the District Judge against so much of the decree as awarded compensation for improvements, and the District Judge held that he had jurisdiction and that the Court-fee must be made up to Rs. 650, and on failure to make up the Court-fee dismissed the appeal.

The questions raised by the application for revision are important and the authorities are conflicting. *Hayat v. Sant Ram*, 20 P. R., 1894, *Shaman v. Sundar*, 32 P. R., 1901, ⁽¹⁾ *Najam-ud-din v. Municipal Committee, Delhi*, 6 P. R., 1904, (F. B.) and *Samiya Mavali v. Minammal I. L. R.*, XXIII Mad., 490 have been cited, and several authorities on pre-emption cases are also in point.

I refer the application to a Full Bench.

JUDGMENT OF THE FULL BENCH.

LAL CHAND, J.—(27th July, 1907).—The facts, so far as they are necessary for deciding this petition for revision, are given in full in the referring order. Two questions are raised in the grounds for revision.

(1) The amount of Court-fee payable on the memorandum of appeal filed by plaintiff in the Court of the District Judge.

(2) Whether the District Judge had jurisdiction to entertain and hear the appeal.

As regards the first question the amount payable must, under the Court Fees Act, depend on the value of the subject matter in dispute in appeal. The suit was for possession of a house, and under Section 7 V (e) of the Court Fees Act, where the subject matter of the suit for possession is a house, the value of the subject matter in dispute shall be deemed to be the market value of the house. The plaintiff in his plaint in this case valued the house at Rs. 90 for the purposes of the Court-fee as well as of jurisdiction. By Section 9 of the Court Fees Act, Courts are empowered to ascertain the market value, if there be reason

(1) s. c., 88 P. L. R., 1901.

to think that the market value has wrongly been estimated by the plaintiff in his plaint. The procedure laid down by Section 9 of the Court Fees Act may be followed by the Court of first instance at any stage of the case *Jhanda Khan v. Bahadar Ali*, 3 P. R., 1893. In the present case the Court did not issue a commission at once to ascertain the market value, but at a later stage of the proceedings appointed a commissioner to ascertain the improvements effected by the defendant. These were found to be of the value of Rs. 637, whereupon the Court in its final judgment directed the plaintiff to make up the deficiency in Court-fee before executing the decree. The procedure thus adopted by the first Court was on the face of it not quite regular. In a matter of this nature, specially when on the defendant's pleas, it appeared that the value of the house had been under-estimated in the plaint, the Court ought to have taken immediate steps under Section 9 for ascertaining the market value, and ordered the deficiency to be made up if the result of the enquiry showed that the value had actually been under-estimated by the plaintiff. The plaintiff has not in such cases any option by law to fix valuation for the purposes of Court-fee. The responsibility for ascertaining the proper value evidently rests on the Court entertaining the suit whose decision as regards valuation is final under Section 12 of the Act. It is really unfortunate that the provisions of Section 9 are not kept in view, as they ought to be by the lower Courts, so as to eliminate from the case all elements of uncertainty in the matter of payment of Court-fees. In the present case, I take it, though the procedure followed was somewhat irregular, that the market value of the house in dispute was finally fixed by the first Court at Rs. 650 as has been pointed out by the District Judge also in his order under revision. The plaintiff was, therefore, bound to pay Court-fees accordingly on the appeal filed by him in the Court of District Judge for possession as originally claimed without payment of any compensation before the appeal could at all be entertained. (Cf. *Perhu v. Sandgar*, 33 P. R., 1884, F. B. and *In the matter of a reference under the Court Fees Act*, I. L. R. XXIII Mad., 84). The suit in this respect is clearly distinguishable from those cases where the fee is fixed either by rules or by provisions of the Court Fees Act, or where the valuation is left entirely at the option and discretion of the plaintiff. It is, therefore, unnecessary to refer to, or consider in this connection, cases relating to suit for pre-emption or redemption of a mortgage.

On the second question I am equally clear that the District Judge had no jurisdiction to entertain and hear the appeal.

The suit was for possession of a house, which plaintiff valued at Rs. 90 for Court-fee and jurisdiction, and which the Court found was worth Rs. 650. Under Section 39 of the Punjab Courts Act an appeal lies "to a District Judge from a decree of the *Munsif* in a small cause or in an unclassified suit of value not exceeding one hundred rupees."

By Section 3 (4) of the same Act "value used with reference to a suit means the amount or value of the subject matter of the suit." The subject matter of the suit in this case is a house. An appeal would, therefore, lie to the District Judge under Section 39 of the Punjab Courts Act if the value of the house did not exceed one hundred rupees. What is then the value of the house for purposes of the appeal? Is it the value as stated by the plaintiff in his plaint or is it the value as ascertained by the first Court, though it may be for the purpose of determining the amount of Court-fee? The Suits Valuation Act is altogether silent on this point, but it appears to me that in the absence of any legislative provision applicable to the question the test ought to be at least *prima facie* the value as determined by the Court rather than as alleged by the plaintiff. In a case of this nature it is evidently the duty of the Court to finally ascertain the valuation for the purposes of the Court Fees Act, and it seems to me to be reasonable that the value so ascertained should furnish the test for determining the question of jurisdiction both in the first instance as well as for appeal. Obviously if the value so found exceeded the pecuniary limits of the jurisdiction of the Court trying the suit, the plaint would have to be returned for presentation to a proper Court. The Court could not pass a decree for possession of a house, which exceeded in value the pecuniary limits of its own jurisdiction. This is absolutely clear and admits of no possible doubt. Moreover, the question of jurisdiction is primarily a question for sole determination by the Court itself, and the Court would rarely be not justified in assuming jurisdiction on a mere allegation as to valuation made in the plaint, thereby delegating to one of the parties what the Court ought to decide itself for itself. There is no legal warrant for any such assumption being made. In certain classes of cases the value of suits for purposes of jurisdiction is determined by the provisions of the Suits Valuation Act or by rules framed under its provisions. In other cases the value must necessarily depend on an adjudication made by the Court and not at the discretion of the plaintiff.

The plaintiff, no doubt, is required to state in his plaint the value for purposes of jurisdiction, but his statement, where it does not merely comply with legislative provisions, must be subject to an adjudication by the Court in the same manner as any other allegation made in his plaint by the plaintiff.

It would really look anomalous if it were held that in a case dependent on valuation of the subject matter for purposes of jurisdiction a plaintiff could arbitrarily choose his own Court by an arbitrary valuation of the property. In the case of a conflict between the value fixed by plaintiff and that ascertained by Court the latter ought certainly to prevail and not the former. Further, as pointed out already, it is the duty of the Court in such cases to ascertain the valuation for the purposes of Court-fee. It appears, therefore, not only convenient, but also reasonable, that the value for jurisdiction should be the same and not different. This principle has directly been recognised under Section 8 of the Suits Valuation Act in by far the larger majority of suits where Court-fees are payable *ad valorem*. The same principle was applied in *Najam-ud-din v. Municipal Committee, Delhi*, 6 P. R., 1904, (F. B.) to suits where High Courts are empowered to frame rules under Section 9 of the Suits Valuation Act. Why this simple principle was not rendered applicable by Section 8 to suits for possession of houses is not easily explicable. Probably the omission was due to the circumstance that Section 7 V, Court Fees Act, includes under the same clause suits for possession of lands, house and gardens, and rules had to be framed in case of possession of lands and gardens differing from valuation fixed for the same under the Court Fees Act. But whatever might be the true explanation I am unable to infer from the omission itself, that it was intended to fix different valuations for Court-fee and jurisdiction in a suit for possession of a house.

The view I take is directly supported by *Parsick v. Parsick*, 72 P. R. 1899. It was there held by the Hon'ble Chief Judge that in a suit for possession of a house the value for purposes of jurisdiction should be the same as the value for purposes of Court-fee, that is, its market value.

This case was to a certain extent adversely commented upon in *Imam Din v. Ghulam Muhammad*, 101 P. R. 1900. ⁽¹⁾

The danger of "oscillation" pointed out in the latter case may possibly be avoided if it were held that the market value ascertained by

(1) S. C., P. L. R., 1900 p. 538.

the Court is final for purposes of jurisdiction as certainly it is for the purposes of Court-fees. But at any rate oscillation cannot altogether be avoided where jurisdiction depends upon pecuniary value of the subject matters, and if it is conceded, as has to be conceded that a Court cannot pass a decree for an amount or value exceeding the pecuniary limits of its jurisdiction, it appears to me preferable as the lesser of two evils that the Court should return the appeal if the value found exceeds its jurisdiction rather than pass a decree which it has no jurisdiction to pass.

The cases relating to suits for pre-emption and redemption seem to me to have but an indirect bearing on the point at issue in this case. It is therefore unnecessary to refer to or consider these cases in any detail. But it may be pointed out that in *Harnam Singh v. Kirpa Ram*, 1 P.R. 1887 and *Mussammat Rajo v. Dasu*, 44 P. R. 1888, (F.B.) both Full Bench judgments, the value in a redemption suit for purposes of jurisdiction was held to be the charge on the property, while it was distinctly held both in *Mussammat Rajo v. Dasu*, 44 P.R., 1888, F.B. and *Bhag Mal v. Mohra*, 169 P. R. 1888, that if such charge as found by the Court exceeded the pecuniary limits of its jurisdiction, the Court would be incompetent to pass a decree for redemption, though on allegation made in the plaint it had jurisdiction to hear the suit. The same principle has very recently been applied to a suit for pre-emption in *Muhammad Afzal Khan v. Nand Lal*, 16 P. R. 1908, F. B.

As far as I can make out the allegation contained in the plaint as regards valuation in such suits is purely tentative. It is subject to an adjudication by the Court and liable to be varied. When the Court does make an adjudication its finding replaces the tentative value and the future procedure must depend on the value so fixed, as it is final until set aside on appeal. A plaintiff in his plaint submits his cause of action and prays for certain relief, and in order to *prima facie* fix jurisdiction is required to make certain allegations as regards the value of the subject matter of the suit.

All the allegations made in the plaint are subject to an adjudication by the Court, and none is final in any sense of the term. I, therefore, fail to see why his tentative allegations as regards value for jurisdiction, with which plaintiff has really no concern, and which is a matter peculiarly for the Court to decide, should be held final so as to define and settle the future course of appeal. Even in cases where the question of

jurisdiction depends on the nature of the suit and not on its valuation, the Court would act on its own finding and not on allegations made in the plaint. If the Court finds the suit to be not cognizable, the proper course would be either to dismiss the suit or return the plaint for presentation to a proper Court.

The course of appeal in such cases may possibly be affected by the allegations made in the plaint, because a plaintiff has the right to have his case, as alleged, adjudicated upon by higher Courts, where the law does allow an appeal. But the same right cannot be extended to an allegation made merely for the purposes of jurisdiction, which is only tentative on the face of it and really forms no part of the plaintiff's case. I would, therefore, hold that the market value found by the first Court for Court-fee determined the course of appeal, and that the District Judge had no jurisdiction to entertain it. On these findings I would accept the petition for revision and direct that the appeal filed by plaintiff in the Court of the District Judge be returned to him for presentation in a proper Court duly stamped with an *ad valorem* Court-fee on Rs. 650.

REID, J.—(3rd August 1907.)—I concur.

RATTIGAN, J.—(5th August 1907.)—I agree that the District Judge had no jurisdiction to hear and decide the appeal.

Petition accepted

APPELLATE SIDE.

No. 130.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Kensington.

BHAGAT SINGH, —(DEFENDANT), —APPELLANT,

versus

DEVI DYAL, AND OTHERS, —(PLAINTIFFS), —RESPONDENTS.

CASE No. 161 OF 1908.

Civil Procedure Code (Act XIV of 1882), Section 111—Set-off—Court-fee when not necessary to pay on written statement.

When the defendant does not allege in his written statement that any definite and ascertained sum of money is due to him, but merely pleads that he is entitled to damages arising out of the transaction which is the basis of the plaintiffs' claim, and that if his claim to such damages is considered it will be found that plaintiffs are really entitled to nothing at all, no Court-fee is payable in respect of the written statement, *I. L. R., VIII All., 396; XIII Bom. 672; XV Mad. 29; VIII W. N. Cal. 174; 9 Burma L. R. 285; I. L. R. VII All. 284; XV All. 9; 6 Bom. H. O. R. 151 referred to.*

Miscellaneous first appeal from the order of A. H. Parker Esquire, I.C.S.

District Judge, Lahore, dated 27th November 1907.

Bhagat Ishwar Das, Advocate, for Appellant.

Mr. Petman, Advocate, and Lala Gobind Ram, Pleader, for Respondents.

JUDGMENT.

RATTIGAN, J.—(22nd April 1908.)—The facts of the case are sufficiently stated in the order of the lower Court, dated 27th November 1907. Plaintiffs claimed in their plaint that a sum of Rs. 81,200 was due to them under the terms of the mortgage executed by defendant No. 1 in their favour and dated the 19th October 1898. The suit was instituted on the 27th August 1907. In a written statement which defendant No. 1 desired to file in answer to this claim it was alleged that the plaintiffs took advantage of the fact that defendant No. 1 was in prison, to seize the factory and the other premises mortgaged, and that though the said mortgage was one without possession, the plaintiff obtained possession of the premises illegally and by so doing had “taken the benefit” of the workshop and “cancelled that principal sum and interest”, and should have realized as much as they now claimed.

Upon these pleadings the District Judge framed a preliminary issue to the following effect :—“Does the set off or payment of the amount of “the claim, as claimed by the defendant No. 1, required to be stamped.” After hearing arguments upon this point the learned Judge decided that the facts alleged by defendant No. 1 could not be considered as a payment in satisfaction of the debt ; that they constituted a set-off and that as upon defendant No. 1’s statement, the amount so due was equal to the amount claimed, it must be regarded as an ascertained sum and as such a legal set-off ; and that upon the weight of authority (*I. L. R. VIII All. 396 ; XIII Bom. 672 and XV Mad. 29*, as contrasted with the opinion *per contra* of *Bannerji, J. in VIII C.W.N. 174*), defendant No. 1 was bound to pay Court-fee duty upon the written statement equal to the amount claimed in the plaint. The opinion of Mr. Justice Bannerji above referred to has been accepted as a correct exposition of the law by the Full Bench of the Burma Chief Court in the case of *Muhammad Nassar-ud-Din versus Messrs. S. Oppenheimir*, (9 *Burma Law Reports*, p. 285). In the present case the defendant No. 1, when ordered to pay Court-fee duty on his written statement, declined to do so, and accordingly the District Judge, by order dated the 17th December 1907, refused

to set-off the debt due (or alleged to be due) from plaintiffs to him. Hence this appeal under Section 588 (7) of the Civil Procedure Code.

We have duly considered the authorities quoted and the arguments addressed to us, but we do not feel called upon to express an opinion as to the correctness or otherwise of the rulings relied upon by the District Judge. Assuming for the sake of argument that a written statement in which the defendant claims to set-off against the plaintiffs' demand an ascertained sum of money legally recoverable from the plaintiff is to be treated as a plaint for the purposes of the Court-Fees Act, 1870, we cannot agree that the written statement in this case answers to such a description. Defendant No. 1 does not claim any ascertained sum as due to him from plaintiffs. What he alleges is that plaintiffs must have realized an amount from the profits of the workshop which would be equal to the sum claimed by them. This is really a claim for an unliquidated amount by way of damages for illegal possession, but it is so connected with the claim of the plaintiffs that it would be inequitable to drive the defendant to a separate suit for the enforcement of his alleged claim. It springs from the same contract of mortgage; is intimately connected with it, inasmuch as it was in virtue of their alleged rights under the mortgage that the plaintiffs took possession, and it can readily be determined in this suit (*See I. L. R. VII All. 284; XV All. 9*).

The point which we desire to make may be expressed in different words. It is quite open to argument that if a plaintiff claims a certain sum from the defendant and the defendant claims, as a set-off, a definite sum from the plaintiff, the Court may, upon its findings, have to decide that the plaintiffs' claim fails and that defendant is entitled, upon his pleadings, to a decree against the plaintiff for the amount claimed by him. In such a case it may be that the defendant should be compelled to pay Court-fee upon his written statement as he, by his pleadings, invites an adjudication upon the claim preferred by him and impliedly (if not expressly) asks for a decree in his favour if his claim is proved against the plaintiff.

In such cases it may be open to the Court to find that nothing is due to the plaintiff, but that the defendant is entitled to a decree for the amount claimed by him (*See 6 Bom. H. C. R. 151*). Upon this point we refrain from expressing any opinion, as it is not directly before us.

We refer to it merely for the purpose of differentiating such cases from the one with which we are dealing.

Here, the defendant does not claim any sum from the plaintiffs. He merely pleads that in equity (for such in his claim) he is entitled to damages against the plaintiffs, and that, if effect is given to his claim, it will be found that the plaintiffs are not entitled to claim any sum of money from him. Upon his pleadings it would not be possible for a Court to dismiss plaintiffs' claim and to pass a decree in defendant's favour for any sum of money.

He does not ask for any such decree, nor does he claim that a definite and ascertained sum is due to him. He alleges that plaintiffs have been in wrongful possession of his premises and that the profits which they have so obtained will be found to counterbalance any claim that they may have against him, and upon this allegation he prays that the suit may be dismissed. No doubt in one sense he asks that the amount of such damages may be allowed him in the present suit, but we do not understand this to mean anything else than that, if his allegations are proved, the suit should be dismissed. He expressly states that by this wrongful action the plaintiffs "must have realized at least as much as their claim."

He does not fix this amount, but leaves the Court to find out what his compensation should be, but clearly only with the object of having the plaintiffs' claim dismissed. If Section 111, Civil Procedure Code, is to be construed as enacting that a written statement falling within its purview is to be regarded as a plaint for all purposes, including the purposes of the Court-Fees Act, it must be a fiscal enactment as construed with strictness, and so regarded and construed, it cannot reasonably be held to cover a written statement in which the defendant does not allege any definite and ascertained sum to be due to him, but merely pleads that he is entitled to damages arising out of the same transaction, against the plaintiffs, and that if his claim to such damages is considered, it will be found that plaintiffs are really entitled to nothing at all. Practically this is the purport of the written statement in the present case.

We hold, therefore, that the written statement under consideration does not require a Court-fee stamp, and we accordingly accept this appeal, and, reversing the order of the District Judge, we remand the case to his Court for disposal according to law, Costs up to date will abide the event.

Appeal accepted.

APPELLATE SIDE.

No. 131.

CIVIL.

Before Mr. Justice Robertson.

BUTA SINGH AND ANOTHER,—(DEFENDANTS),—APPELLANTS,
versus

RAM SINGH AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 1028 OF 1906.

Custom—Adoption—Daughter's son—Dhillon Jats of Amritsar District.

Held, that among *Dhillon Jats* of Amritsar district, the custom of adoption of a daughter's son prevails and is not invalid.

Further appeal from the decree of W. A. LeRossignol, Esquire, Divisional Judge, Amritsar Division, dated 18th August 1906.

Mr. Curcharn Singh, Advocate for Appellants.

Lalas Hukam Chand and Mela Ram, Pleaders for Respondents.

JUDGMENT.

ROBERTSON, J. (21st January 1907).—In this case the plaintiffs, who are collaterals in about the third degree from the adopter, sue to set aside the adoption of one Chetu by Buta,—Chetu is the son of Buta's daughter. Buta is alive, and himself sets up the adoption. Of the *factum* of the adoption there can therefore be no doubt, the only question is as to its validity. Both Courts find that adoption occurred in 1901 at any rate, if not before.

The witnesses produced give several instances of such adoptions, and the entry in the *Rivaj-i-am* of 1865 distinctly authorizes them. No instances are actually given in the *Rivaj-i-am*, but its value is increased by the fact that the question was clearly and carefully considered, and different answers were given by different sections of the community, and this *Rivaj-i-am* has been followed by this Court in a case to be noticed later. The answer to Question XIV in the English abstract of Customary Law of Amritsar prepared in 1893 does not give us much assistance. It notes that in many cases the adoption of daughter's sons in the absence of near collaterals was stated to be customary.

As to the statement of Bura in a case in 1883 it is quite clear that he did not mean to say that no custom of adoption existed, but merely that no custom *as set up* of adoption by a widow existed. Under no circumstances would the statement have amounted to estoppel. Even if the first Court had not incorrectly interpreted it, it would merely have amounted to an admission. The first Court says further: "It is admitted that prior to 1865 there was a custom regarding such adoption." If

this be so it is quite clear that the burden of proof which initially lay on the defendant to prove the validity of the adoption (*Rulla v. Budha*), 50 P. R. 1893, F. B., was shifted to the plaintiff, upon whom the burden of proving a change in the custom lay heavily. The admission shows that the *Ricaj-i-am* entry was correct. There are at least three instances of the adoption of a daughter's son given by the witnesses. But in addition to this there are two clear decisions of this Court which appear to me to conclude the matter, one by a Division Bench and one by a Single Bench, in respect of these very *Dhillon Jats* of Amritsar District. In *Kharak Singh v. Indar Singh*, Civil Appeal No. 960 of 1895, it is clearly laid down by a Division Bench of this Court that the adoption of a daughter's son was valid by custom. The same view was taken by a Single Judge in Civil Revision No. 2196 of 1904. Neither of these two judgments was discussed by either of the lower Courts. The latter is a case of *Dhillon Jats* of Tarn Taran *Tahsil*, as is the case in No. 960 of 1895 also.

Under these circumstances I am constrained to hold that the adoption by Buta of Chetu, the son of his daughter, was valid, and in accordance with the custom of the *Dhillon Jats*. The appeal is accordingly accepted and the suit dismissed with costs throughout.

Appeal accepted.

APPELLATE SIDE.

No. 132.

CIVIL.

Before Mr. Justice Robertson, and Mr. Justice Shah Din.

SOHNA,—(DEFENDANT),—APPELLANT,

versus

SUNDAR SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 645 OF 1904.

Custom—Adoption—Daughter's son—Dhillon Jats of Mauza Jawinda Khurd, Tahsil Tarn Taran, District Amritsar.

Held, that among *Dhillon Jats* of *Mauza Jawinda Khurd, Tahsil Tarn Taran, District Amritsar*, the custom of adoption of a daughter's son prevails and is not invalid.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 20th May 1904.

Mr. Harris, Advocate, for Appellants.

Pandit Shiv Narain, Pleader, for Respondents.

JUDGMENT.

SHAH DIN, J. (1st February 1907.)—The facts of this case are as follows. One Jiwan Singh, a sonless *Dhillon Jat* of *Mauza Jawinda Khurd, Tahsil Tarn Taran*, in the Amritsar District, adopted his daughter's son, defendant, in this case, and executed a deed of adoption in his favour on the 14th January 1901. The plaintiffs, who are collaterals of Jiwan Singh in the fourth degree, brought the present suit for a declaration that the alleged adoption of the defendant did not in fact take place and that if it did take place it was invalid by custom. The defendant pleaded that he had been adopted by Jiwan Singh with the observance of the requisite ceremonies accompanied by the execution and registration of a deed of adoption, and that under the custom applicable to the parties his adoption was perfectly valid. The first Court framed two issues on these pleadings: one relating to the *factum* of the adoption, and the other to its validity; and having found in favour of the defendant on both the issues, it dismissed the plaintiffs' suit. On appeal the learned Divisional Judge concurred with the first Court's finding as regards the *factum* of adoption, but differed from it as to the validity of it, holding, after a discussion of the *Riwaj-i-am* upon which the first Court had relied, and a few judicial decisions bearing upon the question, that among *Dhillon Jats* of the Tarn Taran *Tahsil* a sonless proprietor could not adopt a daughter's son. The plaintiffs' suit was accordingly decreed.

The defendant appeals to this Court. As both the Courts have found that the adoption in dispute did as a fact take place, and the correctness of this concurrent finding is not challenged by the learned pleader for the respondents, the sole question for decision in this appeal is whether the defendant upon whom, according to the Full Bench ruling of this Court in *Ralla v. Budha*, 50 P. R., 1833 the onus of proof lay, has established that his adoption is valid by custom. After hearing arguments and referring to the *Riwaj-i-am* and the judicial precedents bearing on the point, we think that the question must be answered in the affirmative. The clauses of the *Riwaj-i-am* of 1865, which are relevant to the present enquiry, are as follows:—

Section IV:

Power of a sonless *Dhillon Jat* to adopt and the rights of the adopted son. *Answer to Q. 13 (clause 1)*. In our tribe the custom of adoption prevails. A woman cannot adopt, but a male sonless proprietor can in his lifetime adopt a boy up to the age of 15. A written instrument is

essential to such adoption as well as the observance of ceremonies such as are performed at the birth of a son. The brotherhood should also assemble. *Answer to Q. 14 (clause 2).* It will be competent to a male sonless proprietor to adopt the son of any person in his own or some other village, from among all the *gots* of the *Jat* tribe except the *Bal got*, it being immaterial whether the adopted person is the son of a collateral near or remote, or of a daughter, or of a sister. The proprietors of Ajnala, Raya, and Amritsar *parganas* made an exception to this general rule and stated that only near collaterals could be eligible for adoption and not every member of the whole *qaum*, and that the issue of a daughter or sister would not be so eligible.

The lower appellate Court remarks that "the *Riwaj-i-am* of the "Amritsar District carries but little weight as an expression of real "custom"; but we find that in *Jiwan v. Hakam Khan*, 140 P. R., 1894, the *Riwaj i-am* of the Tarn Taran *Tahsil* was held to be a reliable and correct record of custom, and that in *Wasawa Singh v. Arur Singh*, 33 P. R., 1900 (p. 120) (1), the *Riwaj-i-am* of the Amritsar *Tahsil* was considered of some value in regard to the question of the validity of adoption of daughter's son among *Gil Jats* of that *Tahsil*.

The answer to Q. XIV in the English abstract of "Customary Law of Amritsar" prepared in 1893, does not afford us much guidance here; it simply notes that in many cases the adoption of a daughter's son in the absence of near collaterals was stated to be customary.

In support of the *Riwaj-i-am* of 1865, the lower Appellate Court notes two instances (1) in village Lopoke, where Jai Singh adopted his sister's son, and (2) in village Khara, where Kharak Singh adopted a foundling. But it does not consider these instances of much value on the ground that there is nothing to show whether there were any collaterals of the adoptive father or whether these adoptions were disputed or acquiesced in. Besides the *Riwaj-i-am* in question, the defendant relied in the Courts below on two judicial decisions in support of his case, *viz.*, (1) a judgment of Agha Kalb-Abid Khan, dated 14th June, 1879, and (2) a judgment of Colonel Riddle, dated 24th December 1885, both of which decide that the adoption of a daughter's son among *Dhillon Jats* of the Tarn Taran *Tahsil* is valid by custom. These decisions the lower Appellate Court has refused to follow mainly on the ground that in recent years the Courts have set aside gifts made to daughters' sons by *Dhillon*

(1) P. L. R. 1900. p. 368.

Jats of this Tahsil. The cases upon which the lower Appellate Court relies in this connection are as follows:—

(1). In Civil Appeal No. 159 of 1899 the Divisional Judge of Amritsar held that among *Dhillon Jats* of Tarn Taran *Tahsil* custom did not empower a gift to a daughter's son in presence of nephews.

(2). In Civil Appeal No. 968 of 1899 the Chief Court held that no custom allowing a gift to a daughter's son of a *Dhillon Jat* was established.

(3). In Civil Appeal No. 193 of 1901, the Divisional Judge of Amritsar held that a gift among *Dhillon Jats* of Tarn Taran *Tahsil* to a daughter's son was invalid when not assented to by the brotherhood.

(4). In Civil Appeal No. 53, decided on 28th January 1903, the Sub-Judge of Amritsar held that a gift to a daughter's son (among *Dhillon Jats*) was invalid as the collaterals had not assented to it.

Now, it will be noticed in the first place, that all these decisions related to gifts made to daughters' sons and are not, therefore, applicable to the question of adoption which is under consideration in this case. In the second place, the provisions of the *Riwaj-i-am*, as to the power of gift are not in all particulars identical with those relating to the power of adoption as set out above, nor can it be said, without examining the facts of each case, how far its particular features as disclosed by the material upon the record, contributed to the decision in that case of the question of custom before the Court.

For the determination of the question that arises in this appeal we have before us no less than three unpublished decisions of this Court which are directly in point, and in two of which it has been definitely held that the adoption by a sonless *Dhillon Jat* of the Tarn Taran *Tahsil* of a daughter's son is valid by custom. In the first of these decisions (Civil Appeal No. 960 of 1895, decided on 24th December, 1897) a Division Bench of this Court held, after citing the *Riwaj-i-am* of 1865 with approval, that among *Dhillon Jats* of Tarn Taran *Tahsil* a sister's son could validly be adopted. If the adoption of a sister's son is valid among these *Jats*, a *fortiori* that of a daughter's son would be so, and it is noteworthy that the learned Judges in the above case laid stress upon the plaintiff's own admission, which was in accordance "with the custom prevalent among the tribes that a sonless *Dhillon Jat* could adopt a daughter's son of 5 years of age in the presence of the brotherhood."

In the other two decisions, *viz.*, Civil Revision No. 2196 of 1904, decided by Mr. Justice Hurry, on 9th July, 1906, and *Buta Singh v. Ram Singh*; P. R. 86 of 1907 ;⁽¹⁾ s. o. P. W. R. No. 113 of 1907, decided by one of us (Mr. Justice Robertson) on 21st January, 1907, it was held that by custom a sonless *Dhillon Jat* of Tarn Taran *Tahsil* had power to adopt his daughter's son. We consider that these decisions conclude the question before us, and following these we hold that the custom of adoption, as embodied in the *Riwaj-i-am* of 1865, prevails among *Dhillon Jats*, *Tahsil* Tarn Taran, and the adoption of the defendant in this case is perfectly valid under the custom.

The appeal is accordingly accepted and the plaintiff's suit is dismissed with costs.

Appeal allowed.

REVISION SIDE.

No. 133.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Johnstone.

ATTAR SINGH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

SANT SINGH AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 997 OF 1906.

Custom—Adoption—Sister's son—Kalals of Butari village in Ludhiana Tahsil.

Held, that the custom of adoption of a sister's son prevails among Kalals of Butari village in Ludhiana Tahsil.

Further appeal from the decree of C. I. Dundas, Esquire, Divisional Judge, Ambala Division, dated 30th July 1906.

Mr. Muhammad Shafi, Advocate, for Appellants.

Bhagat Ishwar Das and Gobind Das, Pleaders, for Respondents.

JUDGMENT.

JOHNSTONE, J.—(16th April 1907).—The parties to this case are *Kalals* (otherwise called *Ahluwalias* or *Nebs*) of *Mauza Butari, Tahsil* and District Ludhiana. The question at issue is the validity of the adoption by defendant No. 1, a sonless landowner, of defendant No. 2, his sister's son. Voluminous evidence was recorded by the first Court whose judgment is a careful and elaborate one. The finding was in favour of the adoption and the suit was dismissed with costs.

The learned Divisional Judge, considering himself bound to follow the view taken in Civil Appeal 371 of 1902 of this Court, a case of the

Kalals of Kalalhatti in the Umballa District, reversed the decision, found the adoption invalid, and gave plaintiff a decree, against which defendants now appeal.

Apart from the ruling quoted above, the Divisional Judge's own ideas seem to have been in favour of the defendants ; and I think it will clear the ground if I record at once my opinion that that ruling is easily and perfectly distinguishable, and by itself forms no sufficient ground for decreeing this claim. It will appear at once, upon a perusal of the following sentences, how mistaken is the Divisional Judge's remark that the circumstances of the Kalalhatti case and of the present case "are very similar." Put briefly, the *ratio decidendi* there was that Kalalhatti being a compact village, entirely founded and owned by *Kalals*, who settled there many generations ago and live mainly by agriculture, the probability is that the inhabitants in connection with the preservation intact of the agnatic group and of the original village community, have adopted the customs of the ordinary Punjabi agriculturist ; and that a different presumption arises where *Kalals* or similar people settle in small numbers in a village mainly held by other tribes. In the present case these *Kalals*, 4 families in all, own only 3 ploughs of land out of 11½ in the "miscellaneous" *patti*, there being 6 other *pattis* of *Jats*; they have not been in the village for more than some 4 generations; they do not themselves cultivate, but are mostly in Government service or in professional occupations; they intermarry with urban *Kalals*, whose customs are admittedly (see plaintiffs' own witnesses) different from those of the *Jats* ; *karewa* is apparently not allowed among them as it is among *Jats* ; and it is contended with great force that these things being so the Kalalhatti ruling, far from being in favour of plaintiffs, is really against them. These statements of facts are clearly warranted by the record. Mr. Muhammad Shafi, for the defendants, urges that even among real agriculturists adoption of daughters' and sisters' sons should be declared admissible as a matter of initial presumption, but here we have against us the ruling *Ralla v. Budha* 50 P. B., 1893, F.B., which has been generally followed these 14 years, though doubts may have been suggested regarding it. I do not think the present occasion opportune for the re-opening of that question.

The initial presumption, then, in my opinion, is as regards these *Kalals* that they do not follow agricultural custom, and for the reasons given in Civil Appeal 371 of 1902, aforesaid, I hold also that they do not follow Hindu Law. I may note, however, that the *Kalals*, being not

of the "twice born" classes of Hindus, even under Hindu Law there would be no prohibition against the adoption of a daughter's or sister's son. It remains to see what is the custom which the evidence on the record shews they actually do follow.

But first I would like to make a few remarks regarding the meaning of the word "agriculturist" and also to the status and occupations of *Kalals* as found in this Province. The learned Divisional Judge seems to me to confound ownership of land with agriculture as an occupation. The distinction is a very clear one, and was brought out forcibly in *Atar Singh v. Prem Singh*, 12 P. R., 1906 ⁽¹⁾, in which case certain *Khatris*, who had held land for no less than 200 years, were taken as non-agriculturists and as a tribe regarding whom no presumption arose that they had adopted agricultural custom. It seems to me clear on the facts given above that the *Kalals* of Butari are not agriculturists properly so called. Again the same idea as that which formed the basis of my judgment in Civil Appeal 371 of 1902 comes out in the two *Bedi* cases, both of Hoshiarpur District, *Khazan Singh v. Maddi*, 122 P. R., 1893, and *Uttam Singh v. Jhanda Singh*, 21 P. R., 1896. In the former case it was found that the *Bedis* formed a compact village living on agriculture, in the latter they were a small section of a village community mainly composed of other tribes. In the latter Hindu Law was applied, in the former agricultural custom.

These *Kalals* came, or say they came, from Ahlu, District Lahore, and are to be found in many parts of the Province. They have taken to a variety of occupations of which agriculture is probably not the most prominent. Their religious and social status was low, but has improved somewhat in recent generations partly from the circumstance that the Kapurthala family belongs to the tribe. On the high authority of the Census Officers of 1881 and 1891 (Messrs. Ibbetson and MacLagan) they should be classed as a whole as "miscellaneous artisans," and so Mr. Gordon Walker, Settlement Officer of Ludhiana in the eighties, also classes them, though he thinks perhaps for that district they might be called agriculturists. Notwithstanding petitions to Government the *Kalals* of Ludhiana have not been included in the list of agricultural tribes of the district for the purposes of the Land Alienation Act. In Kalahatti, District Umballa, as already noted, and in Patti Kalalan, a compact village of *Kalals* adjoining Umballa City, (*Mussammat Kirpi v. Solekh Singh*, 67 P. R., 1894), they have been declared to have adopted agricultura

(1) 108 P. L. R., 1906.

custom ; but equally in Jandiala, District Amritsar, the reverse has been found to be the case,—*Atar Singh v. Guran Ditta* 50 P.R., 1879—upon a careful enquiry into actual practice.

Considering all this and also the circumstance that according to the evidence, *Kalals* of Butari have relations rather with Amritsar and Lahore than with Umballa, I am inclined to hold that the *onus* in the present case, at this stage of the discussion is on plaintiff. But, however it may be, I will consider first the evidence produced or relied upon by defendants.

Defendants have put in a list of adoptions in the tribe, some 30 in number, and this has been exhaustively criticised by *Lala Ishwar Das*. Divisional Judge discusses about half in detail and says the rest are vague. It would be tedious to go through this list *seriatim*. I will content myself with noticing those which seem to me to be unmistakably in favour of defendants and with making a few remarks about the others. No. 3 is no doubt of the town of Khanna, but the case was undoubtedly one of nomination of an heir and the property was 300 *bighas* of land. The heir selected was a daughter's son's son. Rao Singh of Kalal Majra (No. 6) orally adopted Hira Singh, a daughter's son, and there is a nephew of the adopter, an influential man who became *Lambardar vice* Rao Singh, Hira Singh keeping all deceased's property. No. 16 is the case of one Ram Kishen (*Munsif* of Alawalpur) who adopted a daughter's son, his property was in land and was of substantial value. Nos. 1, 2, 4, 10, 11, 12, 15, 17, 19, 22 are objected to by plaintiffs on the grounds that the properties were small and the cases of towns. This is to some extent true. It is also true that in some cases the property was houses or shops. I think Mr. Shafi is right when he protests against the discrimination adopted between town *Kalals* on the one hand and rural *Kalals* not forming compact village communities on the other ; also between house and landed property. Adoption is the appointment of an heir to the whole of the adopter's property. If the tribe anywhere recognises adoption of daughter's sons or sister's sons, the adopted one will, of course, take everything on the adopter's death—land, houses and moveables. In No. 4 it is said that there were no reversioners, but this is incorrect. I lay no stress on the remaining instances, Nos. 5, 7, etc., as in some of them there is some possible doubt as to whether they involve real adoptions at all, and in others special reasons exist why reversioner should not have sued. I should also note that plaintiffs' own witnesses have been forced to admit some 13 of defendants' instances.

Plaintiffs' evidence to rebut all this is weak. His witnesses are numerous, but their value may be gauged by the fact that many of them roundly assert that adoption is not at all allowed among the tribe. Further, some of them first deny the truth of certain of a defendants' instances and then have to admit that the adopted ones are in possession and enjoyment of the adopters' estates. They are able to cite not a single instance of Ludhiana, Amritsar or Lahore in which the adoption of a daughter's or sister's son has been set aside.

For all these reasons it seems to me abundantly clear that the adoption in the present case is valid, and that the decree of the Divisional Judge should be set aside and the suit dismissed with costs.

Appeal allowed.

APPELLATE SIDE.

No. 134.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Jhonstone.

ACHHAR SINGH AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

MEHTAB SINGH AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 142 OF 1907.

Custom—Adoption—Daughter's son—Hindu Nandan Jats of Dasuha tahsil in Hoshiarpur District—Burden of proof—Riwaj-i-Am. Effect of entry in—

Held, that plaintiffs, on whom the *onus* lay, had failed to prove that among Hindu Nandan Jats of Dasuha of tahsil Hoshiarpur District, to which got the parties belonged, that the adoption of a daughter's son was invalid by custom.

The *Riwaj-i-am* of the district showed that among Jats adoption of daughter's son was not invalid, and no instance was forthcoming in this got one way or the other.

Held, that notwithstanding the general custom of the Province the *onus* to prove invalidity of the adoption lay on the plaintiffs.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 26th October 1905.

Mr. Bodh Raj Sawhny, Advocate, for Appellants.

Rai Bahadur Bakshi Sohan Lal, Pleader, for Respondents.

JUDGMENT.

JHONSTONE, J.—(19th March 1907).—In this case the plaintiffs, reversioners of Mahtab Singh, *Jat* of the Dusuha *tahsil* of Hoshiarpur, who is defendant No. 1, in the case, contest the adoption by defendant No. 1 of defendant No. 2, daughter's son of defendant No. 1, and ask that it be declared that the adoption shall not affect their rights. The *factum* and validity of the adoption having been put in issue, the first Court decided that the adoption certainly took place, and it is valid by custom. The learned Divisional Judge, in a brief judgment, took the same view and dismissed the appeal, without summoning the defendants. Plaintiffs come up on the revision side under clause (b) of Section 70 (1), Punjab Courts Act, and their petition has been admitted as an appeal in regard to the question of the validity of the adoption only. After hearing the learned counsel for the appellants, we have arrived at the conclusion that the decision of the Courts below is sound.

The *Riwaj-i-am* is, as regards *Jats* in the district generally, altogether against the plaintiffs, and it must be borne in mind that where it favours females, a special value attaches to such a document, framed as it always is according to the stated views of males only. It is true that no instance in this *got* (Nandan) is forthcoming one way or the other; and from this Mr. Sawhny argues that, inasmuch as the general presumption for the *Jats* of the Province as a whole is against the validity of such adoptions, *Ralla v. Budha*, 50 P. R. 1893, F. B., and inasmuch as in this *got* there is no rebuttal of this presumption, the decision should be in favour of plaintiffs. Ordinarily there might be some force in an argument of this kind, but here special circumstances supervene to render it of no effect. Besides the *Riwaj-i-am*, which is for all the *Jats* of the District, we have the circumstance that in many *gots* (e. g., *Natha Singh v. Sujan Singh* 34 P. R. 1899, and Civil Appeal No. 1296 of 1905) of *Jats* of the District, and even in this very *tahsil* of Dasuha, it has been found, and is undoubted, that the adoption of a daughters' son in the presence of near collaterals is valid. The ruling of Ludhiana District quoted before us, *Ghullu v. Mohabat*, 92 P. R. 1894, is a case of a sister's son and so useless. In our opinion it is very unlikely that this small *got* should have a separate custom of its own, mixed up as it admittedly is in residence with other *gots* and inhabiting a tract in which among *Jats* such adoptions are valid. In the circumstances we hold that, notwithstanding the general rule for the Province as a whole, the burden of proof that

this adoption is invalid lies on the plaintiffs; and, as no instances are forthcoming one way or the other, the inevitable conclusion is that plaintiffs have failed to discharge the *onus* thus laid upon them.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 135.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din,

THAKARIA, AND OTHERS,—(DEFENDANTS)—APPELLANTS,

versus

DYA RAM,—(PLAINTIFF),—RESPONDENT.

CASE No. 899 OF 1906.

Pre-emption suit—Limitation—Punjab Pre-emption Act (II of 1905), (Local), Sections 28, 29. Applicability of—

Section 28 of the Punjab Pre-emption Act is intended to provide a period of at least one year for all persons who had the right to sue at the commencement of the Act and Section 29 provides for the period of limitation in all cases in which the right to sue accrues after the commencement of the Act.

And a suit for pre-emption is none the less governed by section 28 of the Act when under the new Act the plaintiff is relieved of the burden of proving a custom to maintain his suit which he had to substantiate to obtain a decree under the old law.

Further appeal from the order of Major G. C. Beadon, Esquire, Divisional Judge, Hoshiarpur Division, dated 9th July 1906, confirming the order of Lala Achru Ram, Munsif 1st Class, Hoshiarpur, dated 16th May 1906, decreeing plaintiff's claim on payment of Rupees 3,500.

Rai Sahib Lala Sukh Dial, Pleader, for Appellants.

Pandit Shiv Narain, Pleader, for Respondent.

JUDGMENT.

ROBERTSON, J.—(29th March 1907).—The facts are fully given in the judgments of the lower Courts.

It is admitted fully here that if the Pre-emption Act II of 1905, Punjab, applies, then the plaintiffs have a right to pre-empt and the appeal must fail. It is, however, urged that the claim is barred by limitation. Under the old Pre-emption Act the plaintiffs would not have succeeded in a claim to pre-empt, unless he could have proved a special custom, which, it is suggested, he clearly could not have proved

in this case. Consequently, it is urged, he had no right to pre-empt until that right was confirmed upon him by the new Act.

It is urged, therefore, that the plaintiffs who had no right to pre-empt under the old Act, and whose claim is created by that Act, comes within the purview of Section 29 of the Act, and not Section 28, and that his suit is barred in consequence. Section 28 says: "If any person who has at the commencement of this Act a right to sue for pre-emption, which is not provided for under Article 10 of the second schedule, of the Indian Limitation Act, 1877, and is not barred under Article 110 of the said schedule, may exercise such a right at any time within one year from the date of such commencement.

Mr. Sukh Dial argues that as the plaintiff had no right to pre-empt before the commencement of the new Act, he had no right at the commencement of the Act, and as his right is one created by the Act, Section 29 applies, and his right to sue is barred.

We think that this is a strained interpretation to put on the Act, and that the distinction between a right to sue and a right of pre-emption has been overlooked. All that a limitation clause deals with is the right to sue, not the substantive rights on which a suit is based.

Now it was clearly open to the plaintiff at the commencement of the Act to sue for pre-emption on the same allegations as were made in this suit, and had he succeeded in proving his right under the custom in force in his village he would have got his decree. The probability that he would have failed in such a suit is quite beside the question. He clearly had the right to sue, and Section 28 only deals with the right to sue. No doubt the new Act relieves him of the burden of proving that he has such a right by custom, and confers it on him by statute, but that does not affect his right to sue, it only effects the subsequent course of the suit.

Section 29 applies clearly only to the future. Section 28 is intended to provide a period of at least one year for all persons who had the right to sue at the commencement of the act. Section 29 provides for the period of limitation in all cases in which the right to sue accrues after the commencement of the Act. In this case as the plaintiff clearly had a right to sue at the commencement of the Act, though he might not have been able to establish his claim he is entitled to the benefit of

Section 28 and had one year within which to sue from the date of the commencement of the new Act II of 1905. He has therefore sued within time.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISION SIDR.

No. 136.

CRIMINAL.

Before Sir William Clark Kt., Chief Judge and Mr. Justice Reid.

THE KING EMPEROR,—(PETITIONER),

versus

MR. STERLING,—(ACCUSED),—(RESPONDENT).

CASE No. 6 OF 1907.

Criminal Procedure Code (Act V of 1898), Section 454—European British subject—Jury, trial by—Waiver of privilege—Revocability of waiver.

Where an European British subject waived his right to be tried by a jury, but before any action was taken he withdrew the waiver and claimed to be tried by a jury.

Held, that the accused could withdraw the waiver of his right, and his claim should be granted as he acted promptly before any action was taken after his waiver.

Miscellaneous petition to revise the order of the District Magistrate, Lahore, dated 11th October 1907, allowing the accused to withdraw the waiver of his right to be tried as European British subject.

The Government Advocate, for Crown.

Mr. Grey, Advocate, for Accused.

JUDGMENT.

CLARK, C. J. (18th November 1907).—The facts of this case are as follows :—

The accused is an undoubted European British subject and was known to the District Magistrate as such. On 30th September 1907 he was sent up by the Police for trial on a charge under Section 304 A, Indian Penal Code. On that day the District Magistrate proceeded to examine witnesses, apparently dealing with accused as a European

British subject; he also examined the accused on that day, but did not ask him any questions about his claims as a European British subject.

He then heard counsel on both sides as to the offence with which accused should be charged, and adjourned the case till 1st October.

On 1st October he framed a charge under Section 304 (2), Indian Penal Code, directing the accused to be tried by the Chief Court (?); he read the charge to the accused, who pleaded "not guilty," and on being asked if he was a European British subject said that he was. On being further asked whether he claimed to be tried as such, he said "no."

The District Magistrate then proceeded to amend the charge by directing him to be tried by himself instead of by the Chief Court, and Mr. Gouldsbury, Advocate on his behalf, said that he did not wish to call any witnesses or cross-examine any of the witnesses for the prosecution.

The District Magistrate, who was going into camp, thereupon passed an order that judgment would be announced on his return on 11th October, and he increased the amount of bail on which the accused was released.

On the same day, shortly after, Mr. Gouldsbury returned into Court and said that accused wished to withdraw the waiver of his right to be tried as a European British subject and stated that he now claimed a jury. The District Magistrate withheld his decision as to whether he should be allowed to withdraw his waiver till 11th October. On that date the District Magistrate held that he could withdraw his waiver, and committed him to the Court of Sessions, and the Sessions Judge under Section 449 (2), Criminal Procedure Code, transferred the case to the Chief Court for trial.

The Government Advocate has now applied to the Chief Court for cancellation of that transfer and for order that the accused be tried by the Court of Session on the ground that accused having once waived his right to be tried as a European British subject, he cannot again claim such right; and whether he can do so or not is the question which we have now to decide.

A number of authorities have been quoted to us, but they do not help towards a decision on the facts of this case.

Keough v. Crown, 17 P. R., 1878 (Cr.) decided that a European British subject, having waived his right in the first Court, could not re-assert it for the purposes of appealing to the Chief Court. *Queen-Empress v. Grant*, I. L. R., XII Bom., 561, was a similar decision with reference to the revisional power of the High Court.

Neither of these cases is of any help to us in this case, where the withdrawal of the waiver was in the same Court where the waiver was originally made.

Empress, v. Allen, I. L. R., VI Cal., 83, only rules that for the waiver to be effective it must appear that the accused's rights as a European British subject have been made known to him and understood by him.

Emperor v. Sullivan, I. L. R., XXIV All., 511, deals with the right of claiming a jury when being tried by a District Magistrate under Section 351 (1), Criminal Procedure Code.

This is only one of the rights of a European British subject; he may, while waiving his right to be tried by jury, still insist on his other rights, such as the limit of punishment which the Court can inflict. This is a different question from waiving the right to be tried as a European British subject, and the case is no help to us.

Receiving no help from the authorities quoted, we must come to a decision by the interpretation of the appropriate sections of the Criminal Procedure Code, Chapter XXXIII.

Section 453 provides for the case of a person who claims to be dealt with as a European British subject, and Section 454 with the case of a person who does not claim to be a European subject, and Section 454 is the section that governs this case. It runs: "If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed..... he shall be held to have relinquished his right to be dealt with as such European British subject, and shall not assert it in any subsequent stage of the same case." Neither section appears to contemplate the case of a person whose claim has been allowed under Section 453, or whose claim has been tacitly admitted under Section 454, and who subsequently for some reason elects to waive his right.

The sections appear to contemplate that the question of the right to be dealt with as a European British subject shall be dealt with at once when the case commences. Section 453 provides that the person shall make "his claim to the Magistrate *before whom he is brought* for "the purposes of the inquiry or trial," and Section 454 provides for the reason for which the Magistrate shall enquire from "*any person brought before him*" whether he is a European British subject.

It is important to consider what the accused actually did waive. When asked if he claimed to be tried as a European British subject, he answered "no."

It would not be fair to bind him by that bald statement without considering what was his real intention.

The distinction between not claiming a jury when being tried before a District Magistrate, Section 451, and waiving the right of being tried as a European British subject under Section 454, must be clearly borne in mind.

Not claiming a jury would not increase the powers of the District Magistrate, which would still have only extended to a sentence of six months' imprisonment, but waiving the right to be tried as a European British subject would leave the District Magistrate with the powers he has over an Indian subject, namely, a power to inflict a sentence of seven years' imprisonment.

Probably the accused's real meaning was that he wished the District Magistrate to deal with the case there and then without a jury under his limited powers of sentence. When he found that the District Magistrate was not going to deal with the case at once, and had increased his bail, and perhaps on further consideration and advice, he preferred his claim to be tried as a European British subject.

I would hold that it is not clear that there was in fact a waiver of his right to be tried as a European British subject, that the waiver may only have been as to his being tried by a jury. However, even if he had waived his right, I should not in the circumstances of the case hold that that waiver was irrevocable.

No doubt under the strict construction of Section 454, when the right has been waived, it cannot be asserted in any subsequent stage of the same case, and I think that this applies to the Court where the waiver has been made as well as to appellate Courts.

If the District Magistrate had sentenced accused before he had withdrawn his waiver, his waiver could not have been recalled.

But I think a certain amount of margin must be allowed to a party in Court as regards his statements, admissions or waivers. I do not think that a party should be nailed down to a hasty unconsidered admission if promptly withdrawn.

Thus, if a witness swore falsely in the beginning of his deposition and subsequently said, "I repent of having made that statement—it was false"—although he would have committed perjury, I do not think that any Court would punish him for perjury.

Similarly, if a party abandoned any privilege, either in a Civil or Criminal case, and promptly stated that his waiver had been hasty and ill-considered, and he wished to withdraw it, and if no action had been taken on his abandonment, I do not think that a Court should refuse to allow him to withdraw from his abandonment. In this case the withdrawal of the waiver was made promptly, shortly after the waiver had been made, and substantially nothing had been done in the interval. I think the withdrawal of the waiver should be allowed in these circumstances.

I, therefore, hold that accused has not forfeited his right to be tried as a European British subject and would dismiss the application.

Application dismissed.

APPELLATE SIDE.

No. 137.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Robertson.

Mian AMAR SINGH,—(PLAINTIFF),—APPELLANT,

versus

Seth CHAND MAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 165 OF 1905.

Contract Act (IX of 1872), Section 245—Liability of retiring partner.

A partner who has retired before a certain transaction with the firm to which he had belonged takes place, cannot be held responsible unless it can be shown that the transaction was with either a previous customer or one who was aware that the retired partner had been a partner. When a person enters into a transaction with a firm without even knowing that a certain person who has

already retired ever had been a partner, such person is clearly not liable to him whether he has notice of the retirement or not, unless he has actually held himself not to be a partner, a position which gives rise to a different class of consideration.

If a person is a member of a firm, and known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to make his retirement clear, he will be held responsible to them who knew of his partnership and might have been influenced by the fact. But it is definite personal knowledge which is required, not the vague impression that because a firm once belonged to a joint Hindu family all members of that family which may exist, although not personally known to the customer to exist, will for ever be liable unless they take definite steps to disabuse him of his vague impression. It cannot be held as a principle that when a person has dealings with a man who was once a member of a joint Hindu family and competent to pledge the resources of that family, such person can hold the whole of the members who once constituted a joint Hindu family responsible unless they have taken the precaution publicly to proclaim their partition.

If it be shown that the father of a minor son had notice of a fact, such minor cannot say that he had no notice.

First appeal from the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 10th November 1904, dismissing plaintiff's claim.

Bhagat Ishwar Das, Advocate, for Appellants.

Messrs. Shadi Lal and Harris, Advocates, for Respondents.

JUDGMENT.

ROBERTSON, J.—(23rd March 1908).—The facts of this case are fully given in the judgment of the lower Court. We have heard arguments at great length and have been taken through the entire record, but it will not be necessary to write any lengthy decision in this case.

The plaintiff is a depositor who deposited money with a banking firm, the style of which was Ragunath Das Hamir Mal at Hoshiarpur. The question we have to decide is briefly who were the proprietors of the firm of Ragunath Das Hamir Mal, and who are responsible for the money deposited.

We need not spend long in discussing the first point. We think it established beyond doubt that there was a complete partition both of Hindu family and of business in 1877, and that the firm, Ragunath Das Hamir Mal, at Hoshiarpur belonged to Dhanrup Mal, and Dhanrup Mal only.

It is, however, contended for the plaintiff that up to 1877 Chand Mal and Kanak Mal, defendants, were partners in the firm of Ragunath Das Hamir Mal, and that no public notice, or specific notice to the plaintiffs was ever given of their retirement; that every one knew that the firm of Ragunath Das Hamir Mal was a firm belonging to a joint Hindu family, and that that firm was known as the Treasurer's firm. Consequently all descendants of the original owners of the firm must be held to be known partners although not known personally or by name, and that Chand Mal, Kanak Mal and Dhanrup Mal, being all three "Treasurers," are all responsible.

For these reasons it is urged that Chand Mal and Kanak Mal must be held responsible for the money deposited with Ragunath Das Hamir Mal at Hoshiarpur.

Now we have already found that the original partnership was dissolved in 1877. A case exactly on all fours with this case was heard by the same Division Bench of this Court, and the judgment has been published as 78 *P. R.*, 1903. We see no reason for doubting that the view taken in that judgment of the legal questions which arise in this case was correct.

We think it is clearly established law that a partner who has retired before a certain transaction with the firm to which he had belonged takes place, cannot be held responsible unless it can be shown that the transaction was with either a previous customer or one who was aware that the retired partner had been a partner. When a person enters into a transaction with a firm without even knowing that a certain person who has already retired ever had been a partner, such person is clearly not liable to him whether he has notice of the retirement or not, (See 78 *P. R.*, 1903 and authorities quoted there), unless of course he has actually held himself not to be a partner, a position which gives rise to a different class of consideration.

The plaintiff in this case had no dealings with the firm prior to 1877. Nor does it appear that he had any knowledge that Chand Mal and Kanak Mal had been partners in the firm. It is quite clear that in 1877 a separation took place in no hole and corner way, but perfectly openly and publicly. It is clear that the firm actually wrote to the District authorities sending information of the severance, and that this was in no way kept "confidential".

It is true that the authorities declined to allow the responsibilities of any of those already responsible to cease, but this was purely a matter of indemnity and not partnership. There is actual evidence that certain firms were certified, and acknowledged the notification, and we think it remarkable that after all these years even this amount of direct evidence should be forthcoming.

It is perfectly clear that on every occasion of whatever kind in which the question of the proprietorship of the firm of Ragunath Das Hamir Mal at Hoshiarpur was raised, Dhanrup Mal asserted himself to be the sole proprietor. A number of witnesses, nearly all directly interested, say they thought all three defendants were partners, but we find no solid ground for such belief. Tulsi Das, in particular, who says he believed this, has to admit that in his own power-of-attorney Dhanrup Mal states himself to be sole proprietor.

We find that whenever and however the question was raised, Dhanrup Mal consistently represented himself as the sole owner, whether in power-of-attorney, bonds or mortgages, as plaintiff in suits or as defendant in suits, the assertion is clearly and invariably made. And as regards the question of holding out, we think that the visits of Chand Mal and the fact that the name was not changed are quite insufficient to prove any holding out of himself as a partner. Under these circumstances we think it is clear that as regards all persons dealing for the first time with the firm after 1877 in Hoshiarpur, and now suing, it cannot be said that they had any good ground for believing that Chand Mal or Kanak Mal were partners, or that they had knowledge that either ever had been partners, or that either ever held themselves out to be partners.

We now come to the question whether because Ragunath Das Hamir Mal had once belonged before 1877 to a joint Hindu family and this much was known, that all descendants of that joint family must be held to be known partners to all subsequent customers. This is rather a startling proposition. Even in this case it would bring in other members of the family besides those now sued; and it is clear that there is no authority whatever for the proposition. The principle governing the question is the same as that governing the principles of agency. If a person is a member of a firm and known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to

make his retirement clear, he will be held responsible to them who knew of his partnership and might have been influenced by the fact. But it is definite personal knowledge which is required, not the vague impression that because a firm once belonged to a joint Hindu family all members of that family which may exist, although not personally known to the customers to exist, will for ever be liable unless they take definite steps to disabuse him of his vague impression.

We are not aware that it cannot be held as a principle that when a person has dealings with a man who was once a member of a joint Hindu family, and competent to pledge the resources of that family, such person can hold the whole of the members who once constituted a joint Hindu family responsible unless they have taken the precaution to publicly proclaim their partition even though the partition had taken place 20 years before. The appellants hardly ventured to put this proposition forward thus boldly, yet it is involved in the theory actually put forward. We think it is clearly untenable.

We hold therefore in this case that a complete partition of the firm of Ragunath Das Hamir Mal took place in the most open way in 1877, and that the plaintiffs have not shown that they were ever aware that Chand Mal and Kanak Mal had been partners of the original firm; that those partners had retired long before the plaintiffs had any dealings with the firm; and that consequently Chand Mal and Kanak Mal are not responsible for the debts of the firm of Ragunath Das Hamir Mal at Hoshiarpur, as Dhanrup Mal was sole proprietor of that firm.

In regard to the plaintiff in this particular case, we are also of opinion that he clearly had notice and knowledge of the fact that Dhanrup Mal was sole owner of the firm of Ragunath Das Hamir Mal. The deposit was in the name of Amar Singh, a minor son of Devi Singh. The money was Devi Singh's and the transaction was clearly a *benami* one. Moreover, we are prepared to hold that if it be clearly shown that the father of a minor son has notice, such minor cannot say that he had no notice. It is an absurd and entirely untenable position to say that when the person *sui generis* at the time receives notice, it is necessary to give notice again to each of his sons as they attain majority. Still less could it be urged that separate notice must be given to a person who is actually a minor. The statement of Devi Singh, printed at page 14 of paper-book, Part I, makes abundantly clear that Devi Singh had full notice of, and was fully aware of, the fact that Dhanrup Mal was the

sole proprietor of the firm of Ragunath Das Hamir Mal at Hoshiarpur.

For all these reasons we think it is quite clear that the suit was correctly dismissed as regards Chand Mal and Kanak Mal.

As regards Dhanrup Mal it was correctly decreed, but we think the plaintiff is entitled to interest up to date of recovery of the money at the rate contracted for, and we amend the decree to that extent accordingly; each party to bear their own costs in this Court as regards Dhanrup Mal.

As regards Chand Mal and Kanak Mal the appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

No. 138.

PRESENT:—*Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.*

HANSRAJ AND OTHERS,

v.

SUNDAR LAL AND ANOTHER

AND

HANSRAJ AND OTHERS

v.

DWARKA DAS AND ANOTHER

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

CASE No. 39 OF 1905.

Arbitration—Award—Decree passed thereon—Appeal from Governor-General's Agent in Bhopal to the Privy Council—Native State.

No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision.

Quære.—Whether an appeal lies to his Majesty in Council from a decision of the Governor-General's Agent at Sehore in Bhopal?

Appeal from a decree of the Chief Court of the Punjab, dated 27th June 1902, affirming a decree of the District Judge of Delhi, dated 9th April 1901.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN.—(18th March 1908).—The parties to these two appeals or their predecessors in title have been in litigation now for more than 20 years. The subject of litigation is the property of a joint Hindu family engaged in business, with branches in different parts of the country. Part of the family property is situated in British India; part in Native States. The litigation was begun in 1886, in the Court of the Political Agent at Sehore, in Bhopal, by a suit for partition of so much of the family property as was within his jurisdiction. The next proceeding was a suit for partition, commenced in 1888, in the Court of the District Judge of Karnal, in the Punjab.

In August 1897, after prolonged litigation, the parties to the Punjab suit nominated Mr. S. Clifford, Divisional Judge of Delhi, sole arbitrator to decide the matters in dispute in the suit. The arbitrator was to determine what joint property, movable and immovable, except the immovable property outside British India, was to be partitioned between the parties. The appointment of Mr. Clifford was duly confirmed by the Court.

The arbitrator finally submitted his award on June 29th, 1900.

The appellants filed a great number of objections to the award. These objections were considered and disposed of by the District Judge of Delhi, who passed a decree in accordance with the award.

The objections filed by the appellants were all more or less frivolous. In some the arbitrator was charged with misconduct, but, on the face of the objections, it is perfectly clear that there was no misconduct within the meaning of that expression in the chapter on arbitration in the Civil Procedure Code, nor anything that could justify the Court in setting aside or remitting the award.

From the decree of the District Judge, the appellants appealed to the Chief Court of the Punjab.

The Chief Court dismissed the appeal on the ground that the appeal was incompetent, inasmuch as it did not appear that the decree was in excess of, or not in accordance with, the award.

In the meantime the Political Agent in Bhopal had made a decree in accordance with Mr. Clifford's award. There was an appeal to the Court of the Agent to the Governor-General in Central India, but the appeal was dismissed. Special leave to appeal against the order of the Agent to

the Governor-General was granted by this Board on the representation that there was or might be an important question as to the jurisdiction of the Court of the Political Agent. And liberty was reserved to the Secretary of State for India in Council to intervene in his official capacity. Mr. Cohen, who appeared for the Secretary of State, not admitting that an appeal would lie to His Majesty in Council from the order of the Agent to the Governor-General in India, intimated that the Court of the Political Agent in Bhopal would be guided by the decision of the Chief Court of the Punjab if His Majesty thought fit to affirm that decision.

In their Lordships' opinion the decision of the Chief Court is perfectly right. Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed.

The appellants will pay the costs of the appeals other than the costs of the intervenant.

Messrs. Rubinstein Myers & Co.—Solicitors for the Appellants.

Messrs. T. L. Wilson & Co.—Solicitors for the Respondents.

Solicitors for the India Office.—Solicitors for the Intervenant.

Appeals dismissed.

REVISION SIDE.

No. 139.

CRIMINAL.

Before Mr. Justice Reid.

SITA RAM,—(ACCUSED),—PETITIONER,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 331 OF 1907.

Penal Code (Act XLV of 1860), Section 273—Food—Sale of food unfit for use by human beings—Sale for animals.

Held, that section 273 of the Indian Penal Code does not make the sale as horse's food of grain or fodder unfit for a horse to eat, an offence punishable under the section. The word public in Chapter XIV of the Code means human beings in general and do not include animals.

Case reported by H. A. Rose, Esquire, Sessions Judge, Multan Division, on 6th March 1907.

REPORT.

The facts of the case are as follows:—

“The complainant bought 1 maund of bran as food for a pony from accused on about 10th January, 1907, and about 3 or 4 days later his

syce and bearer called attention to its bad condition. He went to see it and found that more than one-fourth of it was caked in lumps full of white ants. Accused was called to settle his bill and refused to take the bran back or allow for it in the bill, so complainant paid him in full and brought the present criminal complaint.

The accused, on conviction by Major W. G. Hodgson exercising the powers of a Magistrate of the 1st Class in the Multan Cantonment, was sentenced, by order, dated 7th February 1907, under Section 273 of the Indian Penal Code, to pay a fine of Rs. 50 or in default to undergo three months' rigorous imprisonment, Rs. 2-5-0 of the fine (if realised) to be paid to complainant.

The fine has been realised.

The proceedings were forwarded for revision on the following grounds :—

"Section 273, Indian Penal Code, is not expressly limited to food intended for human consumption, but Chapter XIV deals with offences relating to public health, etc., and public health could hardly be extended to include the health of animals. If Section 273 is to be extended to horses, why should it not be extended to dogs, cows and various other animals, even to domestic pets? Public is defined in Section 12 of the Code. It would be difficult to contend that it includes animals as well as men.

I am of opinion that the conviction must be set aside."

JUDGMENT.

REID, J. (3rd July 1907).—I concur in the reasons recorded by the learned Sessions Judge for holding that Section 273 of the Penal Code does not make the sale as horse's food of grain, or fodder, unfit for a horse to eat, an offence punishable under the section. Chapter XIV of the Code, which contains Section 273, deals with offences affecting the public health, safety, convenience, decency and morals, and the words "the public" mean human beings in general and do not include animals. Webster's definition: "The general body of mankind or of a nation, state, or community." I set aside the conviction and sentence. The fine, if realised, will be refunded.

Application allowed.

REVISION SIDE.

No. 140.

CRIMINAL.

Before Sir William Clark, Kt. Chief Judge.

FAIZ AHMAD,—PETITIONER,

versus

THE CROWN, THROUGH WALAYAT HUSSAIN,—RESPONDENT.

CASE No. 64 OF 1907.

Contract Act (IX of 1872), Section 108—Stolen property—Sale in overt market—Title—Bona fide sale.

Under section 108 of the Contract Act generally a seller of goods cannot give to the purchaser a better title than he has himself.

The real owner of an animal which had been stolen is entitled to recover it from a *bona fide* purchaser, and the buyer in overt market cannot keep the animal on the ground that he had purchased it *bona fide*.

*Khawajah Zia-ud-Din, Pleader for Petitioner.**Lala Lachmi Narain, Pleader for Respondent.*

JUDGMENT.

CLARK, C. J. (9th December, 1907.)—Wilayat's buffalo was stolen on 20th April 1903, it was recovered from Faiz Ahmad in March 1907; he had bought the buffalo from Khair Din for Rs. 125 (about its full value), Khair Din had bought it from Ram Chand for Rs. 90 in Amritsar Cattle Fair, the buffalo being then in poor condition owing to illness, Ram Chand had bought it from Haku for Rs. 195; Haku said he had bought it from Wadhawa Singh for Rs. 165.

The lower Courts believed Haku's story and convicted Wadhawa Singh under Section 411, Indian Penal Code, and the first Court restored the buffalo to Wilayat. This Court has acquitted Wadhawa Singh, and the question is whether the buffalo should not be restored to Faiz Ahmad, who has applied for revision of the order of the first Court. There is no doubt that the buffalo was stolen, and the Courts have power to pass order under Section 517, Criminal Procedure Code.

There is no doubt that Faiz Ahmad acquired the buffalo honestly after it had been bought and sold in overt market.

The question is whether Wilayat is entitled to recover the buffalo from the possession of an honest purchaser like Faiz Ahmad.

The law on the subject is contained in Section 108 of the Contract Act, and the law in India is different from the law in England.

The question is discussed at some length in the notes to Section 108 of Shepherd's Contract Act, and in India a seller cannot give to a buyer a better title than he has himself, and the buyer in overt market is not protected by any of the exceptions to that section.

Wilayat is therefore entitled to recover the buffalo to which the first Court at all events, of the series of sellers had no good title. The revision is dismissed.

Application dismissed.

APPELLATE SIDE.

No. 141.

CIVIL.

Before Mr. Justice Chatterji, C.I.E. and Mr. Justice Johnstone.

BALWANT SINGH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

RAM DAS,—(PLAINTIFF),—RESPONDENT.

CASE No. 1310 OF 1906.

Valuation of suit—Mortgage—Redemption suit—Value of mortgaged property.—Regulation XVII of 1806, Section 7—Mortgage by way of conditional sale—Notice. Defects in—.

Held, that for purposes of section 40 (b) of the Punjab Courts Act the value of a suit for redemption of a mortgage is the amount held by the lower Court payable to the mortgagee and not the value of the mortgaged property.

Held, also, that under the Punjab Civil Code section 14, clause 3, a suit for foreclosure was necessary before a mortgagee could become proprietor under a mortgage by way of conditional sale.

The omission in the notice of reference to section 7 of the Regulation XVII of 1806 is fatal to the validity of the notice.

Mere offer to pay to the mortgagee the amount due by the mortgagor does not amount to a waiver of his right to take advantage of legal defects in the foreclosure proceedings.

A mortgagee in possession of the mortgaged property does not alter the nature of his possession by merely asserting that he is owner and not mortgagee of the property.

Quære—Whether cross-objection can be filed in an appeal admitted under section 70 (i) (b) of the Punjab Courts Act.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Umbala Division, dated 7th September 1906.

Bhagat Ishwar Das and Rai Bahadur Bakhshi Sohan Lal, Pleaders for Appellants.

Rai Bahadur Lala Lal Chand Advocate, and *Lala Dwarka Das*, Pleader, for Respondents.

JUDGMENT.

JOHNSTONE, J. (2nd November, 1907).—In this case the first point argued before us was whether an appeal lay or whether the case is not one under clause (b) of Section 70 (1), Punjab Courts Act, 1884. The suit is for possession, by redemption, of half of a building, which half, it may be taken as clear, is worth more than Rs. 2,500. But the mortgage burden on this half was only Rs. 1,500, and the claim is for redemption on payment of Rs. 1,000. The decree appealed against is for redemption on payment of Rs. 1,500. The value of the suit is thus Rs. 1,500, but it is urged by defendants-appellants that, inasmuch as the half house is worth over Rs. 2,500, the decree involves directly property worth over Rs. 2,500 and so under Section 40 (1) (a) (ii), Courts Act, a further appeal to this Court is entertainable. We are unable to accept this contention. The property in suit is worth only Rs. 1,500, i. e., the value of the lien which it is the object of the suit to extinguish; and in our opinion to support which there is well known authority, it cannot be said that the decree *directly* involves the actual house. The case is therefore one to be argued on the basis of clause (b), Section 70 (1) aforesaid. The matter is not, in the present case, very important, as each and every ground taken, in the memorandum of appeal could be taken in a revision petition under clause (b).

The first Court has stated the essential facts of the case and we need not repeat them. It is contended first (ground 6) that inasmuch as the term for foreclosure expired in Sambat 1862 (?) years before Regulation XVII of 1806 came into force in the Punjab, the mortgagees became full owners before the new law came into force. To this it is only necessary to reply that under the old law (Punjab Civil Code, Section 14, clause 3) a suit for foreclosure had to be brought, and so the mortgagees, having brought not suit, had not become proprietors before 1872, when the Regulation was extended to the Punjab. This was quite understood by the mortgagees themselves, for in 1876 they applied for issue of notices under the Regulation, and on 6th October 1877, in an execution proceeding, they asked that in the proclamation of impending

auction of the house it should be stated that they were in possession as mortgagees.

Next it was argued that the notices of 1876 were not defective ; but the omission in the notices of reference to Section 7 of the Regulation is conclusive (*Ram Chand v. Sandul Khan* 21 P. R. 1903⁽¹⁾), apart from other minor defects, and we are not prepared to admit that the facts of mortgagor's appearance to contest the notices and of their offer to pay to the proper persons amount to condonation of the defects. The mortgage was alive and the money had to be paid quite apart from any question of regularity or validity of notice, and therefore mere offer to pay to the persons entitled does not amount to waiver of right to take advantage of legal defects in the foreclosure procedure.

Ground 5 contains the contention that the suit must fail by reason of defendants' long adverse possession. It is said that defendant asserted proprietary possession in 1876, but this is not so. They may have said on some occasion that they held as proprietors, but this would not give a starting point for adverse possession, for they were, as we have seen, mere mortgagees and have been mere mortgagees upto the present time, and they could not alter the nature of their possession by a mere assertion. Further the application for issue of notices in 1876 and the petition aforesaid of 6th October 1877 make it clear that they never really took up the position of proprietors in 1876.

This disposes of the appeal under clause (b), Section 70 (1) which we dismiss with costs.

Respondents in cross-objection claim costs in the Courts below, but as no appeal lies, it is doubtful whether cross-objections can be entertained at all. Further, in our opinion, respondents having come very well out of the affairs, can well forego the costs of the litigation.

We dismiss the cross-objections.

Appeal dismissed.

REVISION SIDE.

No. 142.

CIVIL.

Before Mr. Justice Reid.

BHAG SINGH,—(DEFENDANT),—APPELLANT,

versus

DHIRTA SINGH, AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 27 OF 1907.

(1) A. C. 88 P. L. R., 1903.

Punjab Courts Act (XVIII of 1884), Section 70 (1) (b)—Revision—Civil cases—Question of law—Limitation not set up as defence—Omission to consider if the suit is barred by limitation—Material irregularity.

Under section 4 of the Limitation Act a Court is bound to dismiss a suit if it is barred by limitation even when the bar is not set up as a defence and the Court commits a material irregularity if it omits to consider whether the suit is barred or not under the provisions of the Limitation Act.

Petition for revision of the order of A. H. Brasher, Esquire, District Judge, Lahore, dated 22nd June 1906.

Mr. Amrit Lal Roy, Advocate, for Petitioner.

Lala Tirath Ram, Pleader, for Respondent.

JUDGMENT.

REID, J. (1st May 1907).—The suit was for the price of liquor sold by a licensed vendor in a village. The practice is that the liquor is consumed on the vendor's premises, and the vendor's accounts, accepted by the lower Appellate Court, contain entries for small sums, e. g., 16, 9, 4½ annas, which indicate immediate consumption on the premises. "Tavern" is defined in Webster's Dictionary as "a public house where travellers and other transient guests are accommodated with rooms and meals; an inn; a hotel; especially in modern times, a public house licensed to sell liquor in small quantities."

The last definition appears to cover a village liquor shop, such as that at which the defendant-petitioner purchased the subject-matter of this suit. The pleader for respondent contended that the plea of limitation was not taken below and that the Courts had not committed a material irregularity in failing to deal with it, but Section 4 of the Limitation Act imposes on Courts the duty of considering questions of limitation *suo motu*, and acquaintance with the articles and other provisions of the Act is presumed. The question of the applicability of Article 8 should therefore have been considered.

Under Section 70 (1) (a) of the Courts Act, I set aside the decree of the Lower Appellate Court and remand the appeal for decision after consideration of the question whether Article 8 applies.

Costs of this Court will be costs in the cause.

Application allowed.

APPELLATE SIDE.

No. 143.

CIVIL.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

SONUN,—(PLAINTIFF),—APPELLANT,

versus

RUPAN BAI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 630 OF 1907.

*Punjab Pre-emption Act (II of 1905, Local), Section 3 (4)—Member of an agricultural tribe—Mahtams of Muzaffargarh District.**Held.* that Mahtams in the Muzaffargarh District do not belong to an agricultural tribe for the purposes of Pre-emption Act.*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated 12th November, 1906.**Messrs. Shadi Lal and Shah Nawaz, Advocates, for Appellant.*

JUDGMENT.

REID, J.—(2nd December 1907).—The sole question for consideration is whether Mahtams in the Muzaffargarh District belong to an agricultural tribe for the purposes of the Pre-emption Act.

Section 3 (4) of the Act prescribes that "member of an agricultural tribe" shall have the meaning assigned to it by the Alienation of Land Act, 1900.

Counsel for the appellant contended that Mahtams were Jats or possibly Rajputs and as such members of an agricultural tribe, but we find that in Gazette Notification No. 63 of the 18th April 1904, published under the power conferred by Section 4 of the Alienation of Land Act, Jats, Mahtons or Mahtams and Rajputs are agricultural tribes in the Hoshiarpur, Jullundur, Montgomery, Lahore, Ferozepur and Multan Districts, and that neither Mahtons nor Mahtams are included among the agricultural tribes of the Muzaffargarh District.

Under these circumstances we have no alternative to answering the question above specified in the negative.

The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 144.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

JANG BAHADAR KHAN,—(PLAINTIFF),—APPELLANT,

versus

KARM KHAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 334 OF 1907.

*Punjab Pre-emption Act (II of 1905, Local), Sections 12 (a), 14—
Pre-emption—Right of heirs—Sale to collateral—Vendee and pre-emptor
equally related to vendor—Presence of nearer heirs.*

When a sale of land is made to a collateral who is related to the vendor in the same degree as is the plaintiff, the suit must be dismissed though there may be nearer heirs of the vendor living at the time of sale for clause (a) of Section 12 of the Punjab Pre-emption Act confers the pre-emption on the whole line of heirs and not merely on the next and nearest heirs at the time of sale, it being further provided that the right *inter se* would be determined by the order of succession that, is, the nearer heir would exclude the more remote and Section 14 of the Act does not apply when the plaintiff has no preferential right of purchase as against the vendee.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 24th July 1906.

Rai Sahib Lala Sukh Dyal, Pleader, for Appellant.

Mr. Pestonjee Dadabhai, Advocate, for Respondents.

JUDGMENT.

LAL CHAND, J.—(1st May 1907) —This is an application for revision admitted as an appeal under section 70 (b) IV, Punjab Courts Act. The plaintiff-appellant sued for pre-emption claiming that he had a superior right, being an owner in the village and an *ala malik*, whereas the vendees were neither. The lower Courts have dismissed the suit on the ground that the plaintiff and vendees were equally related to the vendor, and plaintiff therefore had not a superior right to pre-empt. A preliminary objection was taken by the counsel for the respondent that the appeal was barred by time as the application for revision was not filed within 90 days. He relied upon *Kishen Dial v. Ram Ditta*, 20 P. R. of 1907⁽¹⁾ to support his contention. For the appellant it was conceded that he was not entitled as of right to a reduction of the time spent in obtaining copies, but it was urged that there were good reasons in the case for holding that he had sufficient cause for not making the application within the prescribed period, and therefore application may be treated as not barred. The matter not being entirely

(1) *s. c. P. L. R.*, 1907.

free from doubt, we permitted the appellant to proceed with his appeal.

On the merits it was contended for appellant that clause (a), Section 12, Punjab Pre-emption Act, confers the right of pre-emption on the nearest heirs only ; that in this case the vendor had sons and brothers who have not sued, but who are admittedly nearer in succession than the plaintiff and the vendees, who are distant collaterals though related equally to the vendor ; that clause (a) was therefore inapplicable to the circumstances of the case, and that under clause (c) of the section plaintiff had undoubtedly a superior right both as an *ala malik* and as an owner in the village against the vendees, who were neither owners nor *ala maliks*.

It was further contended that even if clause (a) applied, plaintiff and the vendees being equally related to the vendor, plaintiff was entitled under Section 14 (b) at least to a decree by pre-emption for one-half share of the property sold. We are of opinion that neither of these contentions is entitled to succeed.

As regards the first contention, it appears to us that clause (a), Section 12, is applicable to the case, though the nearer heirs have not sued for pre-emption. The words used in this clause are "The person who but for such sale would be entitled to inherit the property, in the event of his or their decease in order of succession." It is therefore clear on a plain interpretation of the wording that the right of pre-emption is conferred by clause (a) on the whole line of heirs and not merely on the next and nearest heirs at the time of sale, it being further provided that the right *inter se* would be determined by the order of succession, that is the nearer heir would exclude the more remote. As rightly pointed out by the learned counsel for the respondent, if the contention urged for appellant were accepted, the words "in order of succession" would become meaningless. The right being on the assumption made conferred on one single line of heirs alone, no question of order of succession would or need arise. The argument used for the appellant evidently proceeded on the assumption as if decease at the date of sale were contemplated. This is not what the section says, and as it is unknown at the date of sale who would be the ultimate heir in the event of decease of the vendor, the right for obvious reasons is conferred on the whole line of would-be-heirs. We, therefore, hold that clause (a), Section 12, is applicable and excludes the application of clause (c) of the Punjab Pre-emption Act.

As regards the second contention it fails equally in our opinion. The right of pre-emption is defined by Section 4 of the Act to "mean" "right of a person to acquire immoveable property in preference to" "other persons." The right to sue is conferred by Section 18 on "any" "person entitled to a right of pre-emption," that is, applying the definition on any person entitled to acquire the land in preference to other persons. Plaintiff admittedly in this case has not a superior right as against the vendee under Section 12 (a) as he is not nearer in order of succession, nor is he entitled to obtain a decree for one-half share under Section 14 (b) as the section refers to cases "where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption," that is, substituting the definition, are found to be equally entitled to acquire the property in preference to another person, *viz*, the defendant. In the first place the plaintiff in this case is a single pre-emptor, and moreover, he is not found to be entitled to the right of pre-emption, that is to acquire the lands sold in preference to the defendant. As a matter of fact the plaintiff in this case is not entitled to sue for pre-emption at all under Section 18 as pointed out already. The question therefore of his being entitled to receive one-half share as equally entitled does not and cannot possibly arise. What was said in the Full Bench judgment in *Ahmad v. Ghulam Mohammad*, 94 P. R. 1904⁽¹⁾ F.B. that a claim to joint acquisition of such property is not within the scope of the Pre-emption Act, seems to us equally applicable to the provisions of the new Act. We therefore hold that plaintiff is not entitled even to a decree for one-half share and his suit has rightly been dismissed by the lower Courts. We therefore dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 145.

CIVIL.

Before Mr. Justice Robertson.

MAHMUD KHAN,—(DEFENDANT),—APPELLANT,
versus

KHUDA BAKHSH,—(PLAINTIFF),—RESPONDENT.

CASE No. 44 OF 1907.

Pre-emption suit—Rival plaintiffs—Sale to one of them having superior right—Lis pendens.

Where several pre-emptors bring suits against the vendee and land is transferred to one of the plaintiffs whose right of pre-emption is superior to that of other

(1) *n. c.* 103 P. L. R., 1904, (F. B.).

plaintiffs the transfer is not bad and the doctrine of *lis pendens* does not apply to such cases.

Further appeal from the decree of Pandit Joti Pershad, District Judge, Gujrat, dated 20th July 1903.

Mr. Nanak Chand, Advocate, for Appellant.

Messrs. Ganpat Rai and Roshan Lal, Advocates, for Respondent.

JUDGMENT.

ROBERTSON, J. (11th January 1907).—The facts of the case are as follows :—

On 18th May 1902 one Karim Dad sold certain lands to Moula Bakhsh.

On 22nd October 1902 Amir Bakhsh brought a suit for possession by pre-emption. On the same day, 22nd October 1902, Khuda Bakhsh filed a similar suit. Later the present appellant also filed a suit for pre-emption, his claim was admitted and a registered deed of sale was executed by Moula Bakhsh in his favour on 7th November 1902. He accordingly allowed his own suit to be dismissed in default, and applied to be joined as a defendant in each of the suits by Amir Bakhsh and Khuda Bakhsh, and this was done.

Both the Lower Lower Courts have decreed against the appellant on the ground that the sale to him was made '*pendente lite*' after the service of summons in the cases brought by Amir Bakhsh and Khuda Bakhsh and that the sale is void in accordance with the doctrine of '*lis pendens*.'

The only question before us is whether the doctrine of *lis pendens* applies in the present case.

In our opinion it does not. Put broadly and briefly the doctrine of *lis pendens* forbids creation of new rights over property already the subject of suit *pendente lite* which are calculated to injure the rights of the claimant. It does not, and if we consider for a moment we see that it could not, apply to the assertion of rights which existed prior to the institution of the pending suit.

There we have the assertion by the appellant of a right which existed prior to 22nd October 1902. It has been clearly laid down that a pre-emptor is in no worse position when asserting his right privately than when he asserts it by suit. *Amirullah Shah v. Tabe Hussain*, 138 P. R., 1884; *Mahtab-ud-din v. Karam Ilahi*, 73 P. R., 1898; *Serh Mal v. Hukam Singh*, I. L. R., XX All., 100. There the appellant asserts his right not only privately but by suit, and that suit was compromised

in his favour so that he allowed to be dismissed in default. No doubt he gets no further rights as against the respondent by the deed of sale *per se*, but he can maintain that sale if he can prove a pre-existent right to have it executed in his favour. So far only does the doctrine of *lis pendens* apply that the sale could create no new right in his favour having its birth subsequent to the suits of the respondent, but obviously he is not debarred from asserting any pre-existent right he may have had against the vendor and the vendee by the mere fact that someone else had brought a claim against them in reference to the same property.

The law of *lis pendens* is laid down in *Bellamy v. Sabine*, *L. J. R. Ns.*; Vol., XXVI, p. 797 briefly thus :—It affects him (*i. e.*, the subsequent purchaser) because the law does not allow to litigate parties and give to them pending litigation rights in the property in dispute so as to prejudice the opposite party.

In claims for pre-emption the right of any particular claimant is not prejudiced, *qua* own right by the assertion by another claimant of his own pre-existing rights.

In the same judgment the Lord Chancellor also laid down : “Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decisions in the suit shall be binding not only upon the litigant parties but also upon those who *derive title under them by alienation made pending the suit.*”

No doubt the sale to the appellant, Mahmud Khan, would be useless to him if that were the basis of his title, but here his title to pre-empt was existent prior to the suit and is independent both of it and of the subsequent sale which was only executed in recognition of the assertion of his right. If that right is superior to that of Qaim Bakhsh and Khuda Bakhsh the doctrine of *lis pendens* would not apply to the sale which only recognizes a right superior to that of the other claimants.

Our attention has been called to the decision in *Harnam Singh v. Jiwan*, 7 *P. R.*, of 1906 ⁽¹⁾ by a single Bench. The facts of that case were not quite on all fours with those of this case, but after considering that judgment we hold that the principles which we have communicated above are correct, and that the doctrine of *lis pendens* cannot be called in in this case to defeat the claims of another claimant

(1) *s. c.*, 56 *P. L. R.*, 1906.

whose right to pre-empt existed before the suit of the other claimants were filed.

Subject to any special circumstances which may have deprived him of that right if such claimant had a superior right to pre-empt, existing, prior to the suits of other claimants, it is clear in our opinion that he is not debarred by any doctrine of *lis pendens* from asserting that right and carrying it to its legitimate conclusion by securing a transfer from the original vendor, even though other claimants with inferior rights may have asserted their claims by suit. We accordingly accept the appeal and set aside the judgment and decree of the Lower Appellate Court, and return the case under Section 562, Civil Procedure Code, for decision on its merits. Stamp on appeal to be refunded. Costs to be costs in the cause.

Appeal allowed.

FULL BENCH.

APPELLATE SIDE.

No. 146.

CIVIL.

*Before Mr. Justice Reid, Mr. Justice Rattigan and
Mr. Justice Lal Chand.*

MUHAMMAD AFZAL KHAN, AND OTHERS,—(DEFENDANTS),—

APPELLANTS,

versus

NAND LAL,—(PLAINTIFF),—RESPONDENT.

CASE NO. 919 OF 1905.

Suits Valuation Act (VII of 1887)—Pre-emption suit—Valuation of suit—Value of land—Consideration for sale exceeding pecuniary limits of jurisdiction of Court—Procedure.

The plaintiff sued for possession of agricultural land. Thirty times of revenue payable on the land did not exceed pecuniary limits of the Court of *Munsif*, 1st Class, and it was instituted in his Court. The consideration expressed in the sale-deed was Rs. 5,000, and the Court, finding that the price was not fixed in good faith and that the market value was Rs. 4,098, gave the plaintiff a decree for possession conditional on payment of that sum.

Held, by the Full Bench, that the *Munsif* being incompetent to pass a decree conditional upon payment of a sum which exceeded pecuniary limits of his jurisdiction, he should have returned the plaint to be presented to higher Court having jurisdiction to try the suit.

Further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Lahore Division, dated the 16th May 1905, modifying the order of Lala Tirath Ram, Munsif, 1st Class, Sharakpur, at Lahore, dated the 22nd August 1904, decreeing possession on payment of Rs. 4,098.

Rai Sahib Lala Sukh Dial, Pleader, for Appellants.

Mr. Herbert and Bhagat Ishar Das, Pleaders, for Respondent.

JUDGMENT OF THE FULL BENCH.

REID, J. (25th July 1907).—The question of the jurisdictional value of this suit and of the competency of the Court of first instance to pass a decree for possession on payment of Rs. 4,098 has been referred to a Full Bench in view of the conflicting decisions in Civil Appeal 427 of 1907 and Civil Appeal 941 of 1905.

The suit was for possession, as pre-emptor, of agricultural land of which the annual Government revenue was Rs. 21-7-10, 30 times which, the value for purposes of jurisdiction under the Suits Valuation Act, is approximately Rs. 644.

It was instituted in the Court of a *Munsif* of the 1st Class, whose jurisdiction was limited to Rs. 1,000. The consideration expressed in the sale-deed was Rs. 5,000, and the Court, finding that the price was not fixed in good faith and that the market value was Rs. 4,098 gave the plaintiff a decree for possession, conditional on payment of that sum.

In C. A. 427 of 1907 a Division Bench held, in a similar case, that a *Munsif* of the 1st Class could pass a decree for pre-emption on payment of Rs. 5,000, thirty times the Government revenue of the land in suit, being Rs. 406-12-0. Reliance was placed on the tacit acceptance of this rule in 29 *Punjab Record* 1893, and in C. A. 672 of 1901, dealt with, on the question whether an appeal lay, and in 24 *Punjab Record*, (F. B.) 1903 (1). It was held that 58 *Punjab Record* 1902 and 46 *Punjab Record* 1906 (2), did not affect the question under consideration, inasmuch as the suits therein dealt with were suits for settlement of partnership accounts and recovery of such sums as might be found to be due, the value at which each suit was assessed by the plaintiff being tentative and the value for purposes of Court-fee and jurisdiction being identical. 29 *Punjab Record* 1893 dealt with a suit for pre-emption of agricultural land, thirty times the annual revenue of which was Rs. 935. The plaintiff assessed the price at Rs. 2,500, and the Courts below, *Munsif*

(1) s. c., 35 *P. L. R.*, 1903, (F. B.).

(2) s. c., 94 *P. L. R.*, 1906.

and Divisional Judge, concurred in finding it to be Rs. 2,822. It was held that a further appeal lay, the decree involving directly a claim to or question respecting property of the value of Rs. 1,000 or upwards, i. e., the price to be paid on pre-emption.

The suit had been valued at Rs. 1,049 on Government revenue of Rs. 34-15-6, but the revenue was found by the Court, presumably the District Judge, to be Rs. 31-2-9, and the value therefore Rs. 935-2-6. The suit was therefore apparently transferred to a *Munsif*. The question of jurisdiction of the *Munsif* was not considered, the judgment running "we think that granting the value of the suit was under Rs. 1,000, &c."

In 24 *Punjab Record* (F. B.) 1903 (1), the sole question considered was whether an appeal lay in certain pre-emption suits and suits between mortgagors and mortgagees. In one case dealt with, C. A. 672 of 1901, above cited, a *Munsif* had passed a decree for pre-emption of agricultural land assessed to revenue at Rs. 2, on payment of Rs. 800, his pecuniary jurisdiction being limited to Rs. 500. The question of the jurisdiction of the *Munsif* to pass the decree was not touched.

In another case dealt with in the same Full Bench ruling, a suit by mortgagee for possession of land assessed for revenue at about Rs. 25 the Courts below concurred in passing a decree for redemption on payment of Rs. 4,418-12-0 by the defendant. Here again the judgment of the Full Bench did not touch the question of jurisdiction below.

In Civil Appeal 941 of 1905, my brother Chatterji considered the question now referred and delivered judgment as follows:—

"The value of the suit as a suit for pre-emption was within the jurisdiction of the first Court, a *Munsif* with 3rd class powers. Plaintiff stated that he claimed pre-emption on payment of Rs. 80 or such sum as the Court found to be the market value of the land.

"The last clause would make it doubtful whether a Court of limited powers, such as the first Court was, could hear the suit, but Section 4 of the Suits Valuation Act provides that the value shall not exceed that fixed under rules made under Section 3 of the Act by the local Government. In the Punjab this value is thirty times the *jama*, and the value of the land is therefore Rs. 7-8-0. Hence, the first Court had jurisdiction to entertain the suit.

(1) S. C., 35 P. L. R., 1903, (F. B.).

"But had it jurisdiction to pass the decree it did pass, viz., that plaintiff is to pre-empt on payment of Rs. 750? I think not. The general principle of law is that a Court cannot pass a decree for payment of a sum beyond the pecuniary limits of its jurisdiction even as a condition precedent to getting something else done. This has been repeatedly affirmed in this Court—See No. 169 *Punjab Record* 1888, and a recent judgment No. 46 *P. R.*, 1906 (1). The same principle was substantially affirmed in No. 58 *Punjab Record* 1902, and also in No. 20 *P. R.*, 1879. Section 4 of the Suits Valuation Act, while it gives a rule for the valuation of suits for pre-emption, does not authorise decrees being given beyond the competency of the Court. The apparent anomaly is due to the artificial provisions of the Act, Sections 3 and 4. As a matter of general principle, if the contrary doctrine is held, the result would be very far-reaching and disastrous. A Court with powers up to Rs. 100 would be able to pass decrees in redemption suits and pre-emption suits on payment of lakhs of rupees, provided plaintiff in his plaint alleged a sum to be due or payable which was within the jurisdiction of the Court, or the rules under the Suits Valuation Act, where they applied, fixed such a sum as the value. I prefer therefore to follow the ordinary rule and the authorities above cited, and hold that the first Court could not pass the decree."

"The suit, strictly speaking, ought to be dismissed as pointed out by Sir Meredyth Plowden in *P. R.*, No. 169 of 1888 or as was done in No. 20 of *Punjab Record* 1879, as the issue has been tried and the amount beyond the competency of the Court to decree has been found payable. But I follow the ordinary practice and return the case to the District Judge to be sent to a Court of competent jurisdiction through the plaintiff to whom the plaint should be returned.

"I accept the appeal, and, setting aside the lower Court's decree, return the case as above. Parties will pay their own costs in this Court, defendant not having urged the objection in the first Court and the plaintiff having contested it in the Divisional Court and this Court.

"This order will dispose of Civil Appeal No. 869 of 1905 also."

Of the authorities cited by my brother Chatterji. (1). 20 *P. R.*, 1879 dealt with a suit for possession by redemption of common land of a village, mortgaged for Rs. 82-8-0. The Court of first Instance with pecuniary jurisdiction limited to Rs. 300, found that Rs. 658-4-0

(1) s. c., 94 *P. L. R.*, 1906.

had been expended on improvements, but refused to entertain the plea based on improvements, and decreed redemption on payment of Rs. 82-8-0, the value for purpose of jurisdiction being the amount of the charge on the property and not the value of the property—44 *P. R.*, (F. B.) 1888.—It was held, that the value of the land in suit being clearly in excess of Rs. 300 the Court of first instance had no jurisdiction to try the suit.

(2). 169 *P. R.*, 1888 dealt with a suit for redemption of land alleged to have been mortgaged for Rs. 300. The defendant pleaded that the mortgage-money was Rs 3,000. The Courts below held that the amount was Rs. 300 only, and it was held that a further appeal did not lie, the value of the suit not being raised by the mere plea, as to the amount of the mortgage-money. The judgment ran:—“ He (the *Munsif*) would be competent to try the issue whether the mortgage was for Rs. 300, and, if he found that it was, to decree the suit. If he found that it was more than Rs. 300, he would be competent to dismiss the suit on that finding. He could not be competent to decree the claim on payment of more than Rs. 300, because to do so would be to decree a claim which he would not be competent to entertain, if brought.”

(3). 58 *P. R.*, 1902, dealt with a suit for dissolution of partnership and rendition of accounts, and, as remarked in Civil Appeal 427 of 1907, is not directly in point, the value assessed in the plaint being specifically tentative. That value was Rs. 2,000, and the Court of first instance gave the plaintiff a decree for Rs. 6,410. It was held that the value was the latter sum, and that the appeal lay to this Court.

46 *P. R.*, 1906⁽¹⁾ also dealt with a suit for settlement of accounts and money due thereon, and it was held that, if the Court of first instance found the sum due beyond its pecuniary jurisdiction, it should return the plaint for presentation to a Court with jurisdiction.

The judgment in Civil Appeal 427 of 1907 contains the following passages. “ At the time when the suit was instituted the Court of first instance * * * had jurisdiction to hear and determine it. That being so, can it be affirmed that something transpired subsequent to the institution of the suit sufficient in law to oust the jurisdiction of the Court?”

“ The decree is not for payment of Rs. 5,000 to the defendant, but “ one for possession of land in favour of the plaintiff upon a suit

(1) *s. c.*, 94 *P. L. R.*, 1906.

“properly within the competency of the Court as regards its jurisdictional value and not the less a decree for possession because it is conditional on payment by the pre-emptor of Rs. 5,000 to the vendee.”

In my opinion the Court of first instance, in the case dealt with in Civil Appeal 427 of 1907 had *prima facie* jurisdiction to entertain the suit, the value of which was assessed under the Suits Valuation Act, within its pecuniary jurisdiction, but this *prima facie* jurisdiction ceased on the Court being satisfied that the actual value of the suit was beyond its jurisdiction. As in suits on accounts, the value assessed was tentative, and none the less tentative, by reason of its being fixed in accordance with a provision of the Suits Valuation Act; what transpired subsequent to the institution of the suit was that the Court had, in consequence of the pleadings, to consider and assess the true value of the suit. The value was not increased after the institution of the suit, but the Court discovered from the pleadings that the duty of assessing the true value of the suit was imposed upon it, and that the original valuation was erroneous. In suits in which the sole question for consideration is whether the plaintiff or the defendant has a title to the land in suit, this duty is not imposed on the Court, and the valuation prescribed by the Suits Valuation Act finally decides the jurisdiction, but when the Court is forced to the conclusion that the actual value of the suit is beyond its jurisdiction, that jurisdiction is in my opinion ousted.

A decree making the right to possession conditional on the payment of Rs. 5,000 is, in my opinion, a decree affecting property of the value of Rs. 5,000, and can be passed only by a Court with pecuniary jurisdiction up to that amount.

For these reasons I concur in the finding of my brother Chatterji in Civil Appeal 941 of 1905, and my answer to the reference is that the Court of first instance was not competent to pass a decree for possession on payment of Rs. 4,098 and should have returned the case for presentation in a competent Court.

RATTIGAN, J. (26th July 1907).—I entirely agree, and have only a few words to add. It is, I believe, conceded, that a Court is incompetent to pass a decree for a sum of money higher than the limit of its pecuniary jurisdiction, and, whether conceded or not, the proposition is amply supported by authority, (See No. 58 P. R., 1902 and cases there cited). It is contended, however that in a pre-emption suit, the subject matter of which is land, if the claim is established, the decree passed by this Court is in reality one for possession of the land only, and that

the value of such land is as fixed by the rules under the Suits Valuation Act, 1887. The argument, as I understand it, is that in such cases it is possession of the land alone which is decreed, that that is the sole relief granted, and that the direction in the decree that the plaintiff shall pay a specified sum within a given time or have his suit dismissed, forms no part of the decree itself. I confess I am wholly unable to see the force of this argument. Indeed I may go so far as to say that to me it appears transparently fallacious.

In a suit for pre-emption in respect of a sale of land, the Court has to consider and decide two questions. The *first* is whether the plaintiff is entitled to the right of pre-emption; the *second* is as to the sum of money which, if he establishes his right, the plaintiff must pay to the vendee before possession can be obtained. As regards the *first* question, the suit is rightly valued for jurisdictional purposes in accordance with the value; as regards the *second* question, the value must depend on the amount which the Court finds to be the true value of the land, which may be either the amount specified in the sale-deed or, as the case may be, the market value. When this latter value is found the Court decrees that the plaintiff shall be entitled to possession of the land on payment into Court (if the amount has not already been paid) of the true value of the land within a specified period. How and upon what principle can it be said that the direction as to the amount to be paid by plaintiff, if he wishes to obtain the land, forms no part of the decree? Section 214 of the Civil Procedure Code expressly provides that the "decree shall specify a day on or before which" the amount is to be paid. The direction must, therefore, in every case form part of the decree and be embodied in it. Further it is clearly a "decree" within the definition of that term in Section 2 of the Code. The plaintiff claims to pre-empt certain land at a certain price, the vendee claims a larger amount and the Court eventually finds that a specified amount is the sum payable by plaintiff, and this finding is embodied in the decree. Surely, this is "the formal expression of an adjudication upon a right claimed or defence set up." Moreover, it has never been denied that the Court's finding as to the amount payable is open to appeal at the instance of either party. The plaintiff even if his right of pre-emption is held established and the decree is otherwise in his favour, has nevertheless the right to appeal from that part of the decree which fixes the amount payable by him, and, on the other hand, the defendant-vendee is equally entitled to appeal therefrom. Such appeals

are not provided for in Section 588 of the Code, and, if they lie, as unquestionably they do, it must be because they are appeals from a part of a decree.

I am unable, therefore, to appreciate the argument that in such cases the decree is merely one for possession of land, *simpliciter*, and that the direction for the payment of the purchase-money within a specified period is no part of the decree. The decree is, no doubt, a decree for possession of land, but it is at the same time a decree for possession of land, subject to, or conditional upon, the payment of the amount found to be the actual value of the land. If then (as is almost invariably the case) this actual value is found by the Court to exceed the value as fixed in the first instance for jurisdictional purposes by the rules, the Court's jurisdiction to grant a decree will depend on whether the amount so found does or does not exceed the limit of the Court's pecuniary jurisdiction.

I agree with my brother Reid that the case relating to settlement of accounts and dissolution of partnerships are in point. In these cases the jurisdictional value of the suit is, under the rules, to be fixed by the valuation put upon his suit by plaintiff in his plaint. But it is well settled that if the Court subsequently finds that the sum actually due to plaintiff is in excess of the limit of its pecuniary jurisdiction, it is not competent to grant plaintiff a decree for that amount merely because the suit in its inception was valued at a much smaller amount.

We were much pressed with the argument that inconvenience would result from a negative answer to this reference. One Court, it was said, may hold that the actual value of the land is such that it has no jurisdiction to grant a decree; another Court, not being bound by that finding, may hold that the actual value is such that the case should have been tried and decided by the first Court, and so on. I am not unmindful of these possible inconveniences, though I think that they are greatly exaggerated and that in the majority of cases the difficulty can be got over by resort to the Appellate Court. But this argument would apply equally in the case of suits relating to settlement of accounts and dissolution of partnership, and I cannot in any case accept an argument *at inconvenienti* as sufficient justification for holding that a Court has jurisdiction to pass a decree which is in excess of the limit of its pecuniary jurisdiction.

LAL CHAND, J. (30th July 1907).—I concur.

Appeal allowed.

APPELLATE SIDE.

No 1 47.

CRIMINAL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

MAGHAR SINGH AND OTHERS,—(CONVICTS),—APPELLANTS,

versus

THE KING-EMPEROR,—(PROSECUTOR),—RESPONDENT.

CASE No. 578 OF 1907.

Penal Code (Act XLV of 1860), Section 62—Sentence—Forfeiture of property. Order of, when may be passed.

As a general rule the sentence of forfeiture of property of the accused can be justified only in the case of offences of a political nature against the state or affecting the safety of the public or some section of it. Such sentence should never be passed without some previous enquiry as to the amount and nature of the property affected, and as to the persons whose rights as heirs will be thereby superseded in favour of Government. It would for instance be unduly harsh to reduce widows and children to destitution for the crimes of the husbands or fathers.

So far as ancestral property is concerned the order of forfeiture maintains only during the life of the person against whom it is directed and will not affect the reversionary interest of heirs. 18 P. R., 1908 *referred to*.

Appeal from the order of W. A. Le Rossignol, Esquire, Sessions Judge, Amritsar Division, dated 1st November 1907.

Mr. Grey, Advocate for Appellants.

Mr. Turner, Government A. for Advocate, Respondent.

JUDGMENT.

KENSINGTON, J.—(20th December 1907).—We have further to consider whether that portion of the sentence can be upheld which directs that all the property of the three men condemned to death shall be forfeited to Government under section 62, Indian Penal Code.

By the recent Full Bench decision in *Sadhu Singh v. Secretary of State for India*, 18 P. R., 1908 F. B. it has been decided that so far as ancestral property is concerned the order of forfeiture maintains only during the life of the person against whom it is directed and will not affect the reversionary interest of heirs. To that extent therefore the order is useless in the case of men who are sentenced to death.

As regards moveable property, and all property other than ancestral, the order could stand if considered appropriate, but we do not think

that portion of the sentence ordinarily appropriate in cases of private crime however heinous. It is open to the obvious objection that the effect is to punish innocent persons for offences in which they have no share. As a general rule these very severe measures can be justified only in the case of offences of a political nature against the state or affecting the safety of the public or some section of it. The heinous nature of the crimes with which we are now dealing can hardly be overstated, but it must be recognised that they were crimes of sudden impulse reflecting no criminality on others besides those by whom they were committed.

And in any case we do not think that an order of the kind should ever be passed without some previous enquiry as to the amount and nature of the property affected, and as to the persons whose rights as heirs will be thereby superseded in favour of Government. It would, for instance, be unduly harsh to reduce widows and children to destitution for the crimes of the husbands or fathers. We cannot approve of so severe a measure passed without any enquiry at all.

For these reasons we order that so much of the sentence be set aside as directs forfeiture of property under Section 62, Indian Penal Code.

APPELLATE SIDE.

No. 148.

CRIMINAL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

THE CROWN,—(PROSECUTOR),—APPELLANT,

versus

SAMFULLAH,—(ACCUSED),—RESPONDENT.

CASE No. 556 OF 1907.

Arms Act (XI of 1878), Section 13—Arms—Going armed without a license—Acquittal. Appeal against—Disposal of confiscated arm.

Since the word 'arm' includes the words 'parts of arm' within the meaning of section 4 of the Arms Act a revolver clogged from disuse falls within the definition.

On conviction dangerous weapons should not be sold by auction and care should be taken in orders of the kind to avoid risk of dangerous weapons passing into improper hands.

The Chief Court set aside on appeal the acquittal of the accused of an offence under section 13 of the Arms Act.

Appeal from the order of Bakshi Parma Nand, Magistrate, 1st Class, Attock District, dated 31st May 1907.

Mr. Turner, Government Advocate, for Appellant.

JUDGMENT.

KENSINGTON, J.—(20th December 1907).—This is an appeal by the Local Government against an order acquitting the respondent of an offence with which he was charged under the Arms Act, XI of 1878.

The facts set out by the prosecution, and in our opinion clearly proved by the evidence, are that the Police received information that the respondent (a notorious bad character) was coming towards Attock, armed, with the probable intention of committing a serious crime. On this a sharp look-out was kept by the Police, and the man, a Pathan, aged at least 30, was stopped on suspicion by a constable, to whom he was not previously known, between 8 and 9 A. M. on the Grand Trunk Road. He was at once searched in the presence of two passers-by, who were stopped for the purpose, and a revolver and one cartridge were found concealed on his person.

The Magistrate has expressed a doubt whether the weapon was so found on the man's person, though careful to explain that this was not the ground of acquittal. Having heard the evidence we are quite unable to understand why the Magistrate should have felt any doubt on the point, and he has given no reasons. The suggestion for the defence was that the whole case was concocted by the Police and that the alleged search was a made-up business carried out in Attock itself later in the day. We entirely disbelieve this theory and the defence evidence brought to support it. The Magistrate has himself recognised that the two principal defence witnesses (lambardars) are untrustworthy, and in this he was clearly right. His finding on the point makes his unwillingness to accept the prosecution story unaccountable. We ourselves see no reason whatever for supposing that the case has been in any way concocted.

The acquittal has, however, been based not on the evidence as to the facts but on a supposition that the revolver is not legally an arm because it was not in good working order. Here again the assumption on which this finding was given is incorrect in fact. We have seen the weapon. It is complete in every respect. The mechanism may have been to some extent clogged from disuse, but it is a good

revolver of a military type and quite serviceable. We are supported in this opinion by a report from Messrs. W. Locke & Co., Gunsmiths of Lahore, obtained from them by the learned Government Advocate. That report is not evidence in the case, but if we entertained any doubt as to the serviceable nature of the revolver we should have called a representative of the firm as a witness. As it is, we are satisfied that the weapon does not even need repair to make it efficient for firing purposes.

Further, we could not support the Magistrate's legal finding even if the weapon had been out of repair. It would have been none the less an arm within the definition of Section 4 of the Act by which the word "arm" includes the words "parts of arms." This should have been clear to the Magistrate from the extreme case, which he has referred to but apparently misunderstood in *Nur Din v. Empress* 38 P. R., 1889. The ruling in the *Queen v. Siddappa*, I. L. R., VI Mad., 60 F. B. on which he specially relies for his remarkable interpretation of the law, has been overruled by *Queen-Empress v. Jayarami Reddi*, I. L. R., XXI Mad., 360, F. B., in which it is pointed out that the test is not whether particular weapon is serviceable, but whether it comes within the legal definition of an arm.

The further ruling quoted by the lower Court in *Emperor v. Hupal Rai*, I. L. R., XXIV All., 454, has obviously no bearing on the facts of the present case.

Considering that the respondent had a cartridge in his possession as well as the revolver the case against him was very serious and a more severe sentence should have been awarded than that which we now proceed to pass taking account of the delay which has unavoidably occurred since the commission of the offence.

We accept the appeal and convict the respondent under Section 19 of the Act of going armed without a license in contravention of the provisions of Section 13. He is sentenced to rigorous imprisonment for six months.

The revolver of which the respondent denies ownership will be confiscated and disposed of as the District Magistrate may direct. It should not be sold by auction by the Nazir as erroneously directed by the Magistrate. Care should be taken in orders of the kind to avoid the risk of dangerous weapons passing into improper hands.

Appeal allowed.

REVISION SIDE.

No. 149.

CRIMINAL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

SWAMI DYAL,—(CONVICT),—PETITIONER,

versus

THE CROWN,—(PROSECUTOR),—RESPONDENT.

CASE No. 1093 OF 1907.

Criminal Procedure Code (Act V of 1898), Sections 196, 537—Penal Code (Act XLV of 1860), Section 505 (b)—Complaint. Want of Order authorising filing of complaint—Irregularity—Revision—Criminal cases—Facts.

The accused were arrested on the 9th May and tried on the 10th and 11th May, and convicted of an offence under Section 505 (b) of the Indian Penal Code. On revision it was urged that in the absence of a complaint under Section 196 of the Criminal Procedure Code the Magistrate had no jurisdiction to try the accused, and Section 537 of the Criminal Procedure Code is not applicable to such cases. There was a letter on the record from the Commissioner of the Division authorizing the prosecution of the accused with reference to Section 196 of the Criminal Procedure Code as sanctioned by His Honour the Lieutenant-Governor under Section 505 of the Indian Penal Code.

Held, that even if the letter did not amount in itself to a complaint but merely authorising one, the defect of procedure was cured by Section 537 (a) of the Criminal Procedure Code.

In dealing with an application for revision on facts the correct principle is to refuse interference when there is evidence on the record which is adequate and which, if believed, justifies the conviction. When two Courts have agreed on the facts the mere fact that a Single or Division Bench of the Chief Court might have come, or would have come, to a different decision on the facts would not, except in the rarest cases, justify interference by the Court.

Petition for revision of the order of H. Scott Smith, Esquire, Sessions Judge, Rawalpindi Division, dated 28th May 1907.

Lala Dhanpat Rai, Pleader, for Petitioner.

JUDGMENT.

ROBERTSON, J.—(19th December 1907).—This is an application for the revision of a conviction and sentence under Section 505, Indian Penal Code, by one Swami Dayal.

The first point with which we have to deal is that of jurisdiction. It is urged that there has been no complaint made "by order of or under authority from the Local Government," and it is urged, and *Shamal Khan v. The Empress* 16 P. R., 1890 (Cr.) is quoted in support of this contention, that the absence of such a complaint by a person so authorized, is fatal to the whole proceedings.

We find that the trial itself took place on the 10th of May last, and we find on the record a letter from the Commissioner of Rawalpindi, dated 9th May, authorizing the prosecution of Swami Dayal and Anokha in the following words: "Sir, I am authorized to inform you with reference to Section 196, Criminal Procedure Code, that His Honour the Lieutenant-Governor sanctions the prosecution, under Section 505, clause (b) of the Indian Penal Code, of Swami Dayal and of Anokha on account of offences under that section alleged to have been committed by them."

It is contended that this letter is not in itself a complaint, though it is admitted that it clearly authorizes the prosecution, and it was in the hands of the Magistrate before the trial commenced. The proper and regular course to have pursued undoubtedly would have been for the Deputy Commissioner, either to have made a complaint himself before some other Magistrate or to have a complaint made by some person authorized under Section 196 to make the complaint. The case, the judgment in which is reported as *Shamal Khan v. The Empress*, 16 P. R., 1890 (Cr.) differed very much in one most important particular from this case. In that case an accused had been committed for trial without any authorization whatever, and a letter very much in the same terms as that quoted above was received six months *after* commitment. The Judges in that case in the course of their judgment remarked: "In the present case there is no complaint at all, the sanction given in the letter above quoted of June 29th, 1889, may be an authority to institute a complaint, but the letter is certainly not itself a complaint, and was written six months after the commitment." The commitment was eventually quashed on the obvious ground that when cognizance was taken of the case the necessary authorization was absent. The words therefore which are quoted above to the effect that the letter was not itself a complaint were in the nature of *obiter dicta*.

We find that in an unpublished judgment No. 681 of 1901, by two Judges of this Court (Clark, C. J., and Reid, J.) held that a

letter in these terms from a Commissioner to a Deputy Commissioner, "as the case stands there is a good deal of suspicion against the accused, but it is not as clear as it should be. In my opinion it is always better to deal with such cases as criminal cases, and I think the best thing will be for an Extra Assistant Commissioner to try all the four appellants for attempt to misappropriate....The case should be taken up at once. No order will be passed on this appeal until it is decided" was held to be a complaint under Section 190 (a), although the communication was treated as confidential under the order of the Deputy Commissioner couched as follows: "to be kept separate from the judicial file and no copies or inspections allowed, the Commissioner's order will be treated as confidential" *Shamal Khan v. The Empress, P. R.*, 16 of 1890 (Cr.), *Abdul Aziz v. The Municipal Committee, Bahadargarh*, 1 P. R., 1892 (Cr.); *Abdul Ghani v. The Municipal Committee Peshawar*, 2 P. R., 1892 (Cr.) and *Nur Din v. The Municipal Committee of Lahore*, 3 P. R., 1892 (Cr.), are not discussed in that judgment. The third Judge (Robertson, J.) in that case dissented.

But accepting the view that the letter of 9th May quoted above does not amount in itself to a complaint, but merely authorizes one, we have to consider whether the defect of procedure is not one which is cured by Section 537 (a) of the Criminal Procedure Code.

To begin with the point is in this case obviously purely a technical one. It is clear that no such objection was taken in the First Court, nor in the Appellate Court, nor in the first application for revision to this Court. It was only taken as an after-thought in the extra grounds for revision put in on 2nd September 1907. The absence of a formal complaint, the letter of authorization being on the file, cannot be said to have prejudiced the accused in any way, nor is it urged that it did so. It is simply urged that it is a technical fault in procedure which is not cured by Section 537 (a) and is fatal therefore to the whole proceedings.

Section 537 runs—"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed under Chapter XXVII or on appeal or revision on account (a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Code, or (b) of the want of any irregularity

"in any sentence required by Section 195 or any irregularity in proceedings taken under Section 476 or"

Now it is clear that the District Magistrate treated the Commissioner's letter as a complaint and in the case of *Crown v. Anokha* he specifically records this fact.

We may remark at the outset that we think the words "competent jurisdiction" in the section should be interpreted to mean jurisdiction which would be competent, but for the defect in question whatever it may be. It is urged upon us, however, that there being no complaint at all there was no jurisdiction, and it is further urged that the mention of Section 195 in Section 537 (b) and the omission of Section 196 make it clear that errors and irregularities regarding Section 196 cannot be cured.

We may point out that Section 537 (a) covers the whole surface of the ordinary course of a trial beginning with complaint and ending with judgment, and the ordinary common sense view is that it is intended to cover all errors in mere procedure which do not prejudice the accused or lead to any failure of justice, and the absence of a formal complaint in this case, when the essence was present, appears to us to be just such a technical irregularity as the Legislature intended to cover by Section 537, Criminal Procedure Code.

The meaning of the omission of Section 196 from Section 537 (b) is, we quite agree, most significant. The absence of the special feature of the Section 196 we hold to be quite fatal to any case coming within its purview. We allude to the absolute necessity for the authorization by the proper authority. Such cases are only to be instituted under the ordinary procedure on complaint, and any irregularity in the complaint would come within the purview of the ordinary law, and under Section 537 (a) could be cured. But though an irregularity in any sanction required under Section 195 can be cured by Section 537 (b), we entirely concur in the view that any irregularity under Section 196 as regards the authority necessary before complaint can be made, cannot be so cured. There is no special procedure laid down in Section 196 regarding complaints; it merely prescribes *by whom* a complaint must be made in accordance with the ordinary rules of procedure, and we are of opinion that where the most essential part of the section has been complied with and the formal sanction to entertain the complaint has been incorrectly treated as a complaint

itself, and the intermediate formalities omitted and no detriment has resulted to anyone, Section 196 has no special application and the irregularity is one which is cured by Section 537 (a). We hold in the case that any irregularity regarding the complaint or absence of formal complaint is cured by Section 537 (a).

The next point we have to consider is whether the accused was in any way prejudiced by the manner in which the trial was conducted. The offence is alleged to have been committed at Hassan Abdal on the 26th day of April, the accused was arrested on the 9th May and was tried on the 10th and 11th May. The witnesses were all on the spot and the accused named and produced four witnesses. The third gave evidence against him and he gave up the fourth. He did not then ask for more time to produce evidence, nor did he in the Lower Appellate Court urge that he wished to produce any further evidence, and he was represented by counsel. There is nothing on the record to show that he asked for any adjournment. His counsel was fully heard in the Appellate Court. Turning again to common sense as our guide, and in the vast majority of cases common sense is good law, what would be most likely in any of the ordinary affairs of life to elicit the real truth regarding any occurrence than an enquiry made on the spot, where all those likely to know about the occurrence were present, made very shortly after the event. This is what happened in this trial. The enquiry was made on the spot, and no opportunity denied to the accused of putting forward his defence.

We should not be justified in holding that the accused has been prejudiced, or in setting aside the proceedings on such a ground.

We now come to the facts. This is not an appeal, and speaking broadly, and in no way exhaustively, the recognized principle, and we hold the entirely correct principle in dealing with an application for revision as regards the facts, is to refuse to interfere when there is evidence on the record which is adequate and which, if believed, justifies the conviction. When two Courts have agreed on the facts, the mere fact that a Single or Division Bench of this Court might have come, or would have come, to a different decision on the facts would not, except in the rarest cases, justify our interference. We do not propose therefore to go further into the facts than to note that there is ample evidence on the record which has been believed by both the lower Courts to support the conviction. No doubt much irrelevant

matter has been improperly introduced and discussed by the Magistrate, but the conviction is based upon evidence which, if true, is ample to justify the conviction. As to sentence we have no hesitation. Anything more deliberately mischievous and dangerous than the false statements of the accused it is difficult to conceive. His objects can only have been an exceedingly sinister one, calculated to do great injury to the people of Hassan Abdal and its neighbourhood, and he was entirely without excuse.

Application rejected.

APPELLATE SIDE.

No. 150.

CIVIL.

Before Mr. Justice Chevis and Mr. Justice Kensington.

KHAIRU,—(DEFENDANT),—APPELLANT,

versus

FAKIR CHAND, AND OTHERS—(PLAINTIFFS),—RESPONDENTS.

CASE No. 1167 OF 1907.

Custom—Hindu Law—Marriage—Marriage of a Rajput with a Mahajan woman.

Without laying down any general rule to the effect that a marriage between a Punjabi of the *Kshatriya* caste and a woman of a lower caste is always valid it was held that in this particular case the marriage of a *Rajput* with a *Mahajan* woman in *chadar andazi* form was a lawful one even supposing for the sake of argument that the woman was of *Vaisya* caste.

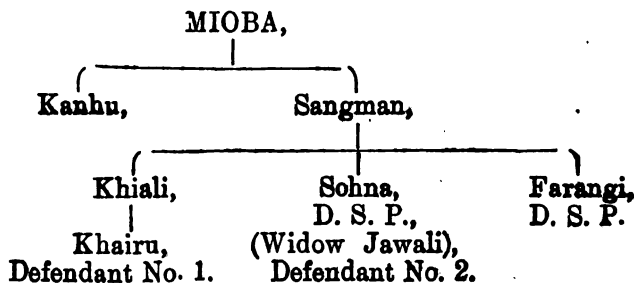
Further appeal from the order of the Additional Divisional Judge, Jhelum Division, dated 19th August 1907.

Mr. Nanak Chand, Advocate, for Appellant.

Mr. Sham Lal, Advocate for Respondents.

JUDGMENT.

CHEVIS J. (2nd June 1908).—The genealogical tree, so far as it is necessary to give it for purposes of this appeal, is as follows :—



Plaintiffs are descendants of Kanhu.

The parties are *Minhas Rajputs* of the Gujrat District. Khairu's mother was a *Mahajan* woman. According to Khairu she married Khiali by *chadar andazi*, the union is a valid marriage, and he is the issue of, and is lawful son and heir of, Khiali. According to plaintiffs, who sue for possession of the property, there was no *chadar andazi* and a union between a *Rajput* and a *Mahajan* woman is unlawful and the issue of such a union has no right of inheritance.

The first Court decided in defendants' favour and dismissed the suit. The Additional Divisional Judge held the union to be invalid, but gave plaintiffs a decree of five-sixths only, leaving Khairu, one-sixth for maintenance.

Khairu appeals, urging that the union was a valid marriage, and that Fakir Chand, plaintiff No. 1, has admitted him to be lawful son and heir of Khiali; also that a suit for possession cannot lie in the lifetime of *Mussammatt Jawali*.

The evidence proves beyond any reasonable doubt that *Mussammatt Bhakhan* married Khiali by *chadar andazi* and that the pair lived together as man and wife for many years. A daughter of the union was married to a *Chib Rajput*. Khairu was also born from this union. That there was not a regular *chadar andazi* has only been asserted in a half-hearted manner, and we have no doubt whatever that a regular *chadar andazi* form of marriage was gone through. We have to see if such a union is valid.

According to appellant's counsel *Mahajans* are *Khatris*, but respondents' counsel asserts that they are *Karars*, and are *Vaisyas* and not *Kshatriyas*. So the woman in this case either belonged to the same primary caste as Khiali, or to the next lower caste. If she belonged to the same caste the union would not be invalid according to Hindu Law, see Appeal No. 904 of 1904, reported in Punjab Law Reporter as No. 64 of 1908 in which the whole question is fully and most ably discussed by Chatterjee, J. But it would be rather an extension of that judgment to say that a marriage between a *Rajput* and a woman of the *Vaisiya* caste is legal. The fact is that that judgment does not discuss the question whether such a union would be valid or not, the only question in that judgment was whether a *Rajput* could marry a *Khatrani*, there is nothing in the judgment to say that he could not marry a woman of a lower caste.

One general rule seems to be established, *viz.*, that ordinarily a woman may not marry a man of lower caste than herself. In Mayne's Hindu Law, 7th Edition, we find (para. 88) "The prohibition against marriages between persons of different castes is comparatively modern. Originally marriages between men of one class and women of a lower, even of the *Sudra* class, were recognised.... All the writers allow marriages between a *Sudra* woman and a *Kshatriya* or *Vaisya*, but there is much conflict as to marriages between a *Brahman* and a *Sudra* woman It seems, however, to have been always admitted that a *Sudra* man could not lawfully marry a woman of a higher class than his own."

Para. 89 says : "Marriages between persons of different classes are long since obsolete, no doubt from the same process of ideas which has split up the whole native community into countless castes which neither eat, drink nor marry with each other." So mixed marriages seem to have become obsolete rather by custom than by any positive prohibition of personal law. But turning again to *P. L. R.*, 64 of 1908 we find the following : "We have said already that in the Punjab caste restrictions are more lax than elsewhere in India, that is to say, the old Aryan customs survive here more than in other parts of India." So it is impossible to say that mixed marriages are entirely obsolete in this part of India ; and mixed marriages have been upheld in several reported cases of this Court, *e. g.*, in *P. R.* 48 of 1890 a marriage between a *Brahman* and a *Rajputni* was upheld, and in *P. R.* 50 of 1900⁽¹⁾ a marriage between a *Jat* and a *Brahmani* woman was even upheld (though this latter case seems rather against the general principle that a woman cannot marry a man of a lower caste than her own and appears to have overlooked *P. R.* 57 of 1893 and 29 of 1883). So it cannot be said that mixed marriages have not been recognized in former judgments of this Court (at all events so far as a marriage of a man to a woman of a lower caste is concerned) so we must now look to this particular case to see if the marriage is forbidden by custom.

Stress has been laid on the *riwaj-i-am* (question 7) where the answer to the question, whether issue succeed in the case of a marriage with a woman with whom marriage is unlawful, *e. g.*, a dancing girl or prostitute or woman of *ghair kaum*, was by some tribes that the son got no share unless the father turned a Muhammadan, while other tribes said that such unions did not occur. But the form in which this question is put prevents us from paying any regard to the answer. If the

woman is one with whom marriage is unlawful, how can the issue possibly count as legitimate? The whole question to be decided in each case is whether there can be a lawful union with the particular woman. Turning to the *Riwaj-i-am* of the neighbouring district of Sialkot we find it laid down that a Hindu cannot marry a woman of a different caste, which is surely a sweeping assertion, the only instances quoted in support are *P. R.* 29 of 1883 and 57 of 1893, both cases in which the marriage was between a *Brahmani* woman and a man of lower caste; such cases do not prove that a woman cannot marry a man of higher caste. Instances that a *Minhas Rajput* can marry a woman of another caste and that in such cases the children do succeed have been given *by plaintiff's witness*, Bakhtar, (see page 5 of the paper book), and the fact that they are instances of the Sialkot district does not entirely destroy their value.

The following circumstances too are in the present case most significant. In 1903 Khiali died, and the *patwari* reported the case, and mutation in favour of Khairu followed in due course. Next year the only surviving widow of Farangi died, and again Khairu got mutation. Fakir Chand, plaintiff No 1, is a *lambardor*, and even if he did not actually assent to mutation in Khairu's favour on both occasions the fact remains that he must have known what was going on and that neither he nor any other of the plaintiffs (who all live in the village) made any objection to the mutations. It was not till 1906 that the present suit was brought, till then Khairu was allowed to remain in unchallenged possession of the lands of both Khiali and Farangi. Surely the mutations would have been objected to had Khairu not been regarded as the lawful son and heir of Khiali? This, coupled with the fact that Khairu and his sister have both married into respectable families, seems to us to leave no doubt that the community never had the least doubt as to the legality of the marriage of Khairu's parents. Without laying down any general rule to the effect that a marriage between a Panjabi of the *Kshatriya* caste and a woman of a lower caste is always valid, we hold that in this particular case the marriage was a lawful one, even supposing for the sake of argument that the woman was of *Vaisya* caste.

We therefore accept the appeal, and, reversing the decree of the lower Appellate Court, we dismiss the suit with costs throughout.

Appeal accepted.

APPELLATE SIDE.

No. 151.

CIVIL.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

SHEO NATH,—(DEFENDANT),—APPELLANT,

versus

PARMA NAND AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 528 OF 1907.

Partition—Abadi—Partition of a portion of joint property not allowed.

The plaintiff claimed to have bought certain shares from some of the co-sharers in the *shamilat abadi* of a *panah* in a village and sued for partition and separate possession of the *abadi* equal to the shares bought by him.

Held, that as there was other *shamilat panah* in the village the suit being one for partial partition could not be allowed.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated 12th December 1906.

Mr. Shadi Lal, Advocate, for Appellant.

Mr. Pestonji Dadabhai, Advocate, for Respondents.

JUDGMENT.

CLARK, C. J. (4th December 1907).—The property in dispute is part of the *shamilat abadi* of *panah* Jadan in *Mauza Chilkana*.

Plaintiff claims to have bought certain shares from certain of the co-sharers, while Sheo Nath, the principal defendant, claims to have bought the whole plot from one of the co-sharers, Nawrang, who, he says, had the right to sell as holding exclusive possession of the plot, though admitting that it was *shamilat panah*.

Plaintiff sued for partition and possession of the shares sold to him.

Among other pleas, defendant Sheo Nath raised the plea that there was other land *shamilat panah* and that plaintiff could not claim partial partition, but must claim partition of the whole *shamilat*.

It is established that there is other *shamilat panah*, and the question for decision is whether plaintiff can claim partition of portion only of such *shamilat*.

The *shamilat panah* is a form of joint property; and the reasons that apply to the partition of joint property apply also to the partition of *shamilat*.

That by Hindu Law there can be no partial partition of joint property is clearly established, *Haridas Sanyal v. Pran Nath Sanyal*, I. L. R., XII Cal., 566; *Venkatarama v. Meera Labai*, I. L. R., XIII Mad., 275, followed in *Palani Konan v. Masakaran*, I. L. R., XX Mad., 243, and *Shivmurteppa v. Virappa*, I. L. R., XXIV Bom., 128.

The case *Subramanya Chettyar v. Padmanabha Chettyar*, *I. L. R.*, XIX *Mad.*, 267, on which Divisional Judge relies in support of partial partition, does not in fact support that proposition, it lays down that where one co-sharer has sold to a stranger, another co-sharer can insist on partial partition as against that stranger, who has been intruded on the joint family, but it maintains the proposition that the stranger purchaser could not claim partial partition.

For plaintiff *Murarrao v. Sita Ram*, *I. L. R.*, XXIII *Bom.*, 184, was relied upon; this only decided that where a partial partition was not objected to by any of the co-sharers, that it was not incumbent on the Court to insist on general partition.

In *Shadi v. Sainditta*, 71 *P. R.* 1887, Sir Meredyth Plowden says: "If a sharer in joint property chooses to select a portion of the joint property for partition, and sue for partition of that alone, his suit for partition of such portion cannot proceed without the assent or acquiescence of the defendant. If the latter object, the plaintiff must either amend with leave of the Court so as to include the whole of the joint property or such less portion as the parties agree to divide, or submit to have his suit dismissed."

It is also obvious that to allow a partial partition might produce a very unfair result. It is quite possible that a co-sharer might have already more than his share in other plots of *shamilat* and be in fact entitled to nothing in the plot of which partition was sought.

We hold that plaintiff was not entitled to claim partial partition and could not have this plot alone partitioned.

We accept the appeal and dismiss the suit with costs.

Appeal allowed.

APPELLATE SIDE.

No. 152.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

Mussammatt ISHRI,—(PLAINTIFF),—APPELLANT,

versus

WADHAWA, AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 659 OF 1907.

Custom—Marriage—Restitution of conjugal rights—Divorce—Repudiation of wife—Transfer of wife by deed—Wife denying right of husband and transferee to conjugal rights—Declaratory suit—Appeal by one of the defendants when there is no common ground for all the defendants.

A wife sued for a declaration that neither her husband *W* nor the defendant *K* in whose favour he had executed a deed transferring her, had conjugal rights against

her. The suit was decreed. On the appeal of *W* the suit was dismissed against both *W* and *K*. On further appeal—

Held, (i) that a suit of this nature was not unmaintainable.

(ii) That the question in such cases is whether there has in fact been such a repudiation of the wife by the husband as amounts to a divorce, and that without deciding that the husband would be entitled to recover possession of the plaintiff the mere execution of the deed in the circumstances of the case was not such as entitled the plaintiff to the declaration sought for against him.

(iii) That on the appeal of *W* the claim against *K* could not be dismissed.

Further appeal from the decree of Captain A. A. Irvine, Divisional Judge, Amritsar Division, dated 29th April 1907.

Pandit Ram Bhaj Datta, Pleader, for Appellant.

Rai Bahadur Bakhshi Sohan Lal, Pleader, for Respondents

JUDGMENT.

ROBERTSON & KENSINGTON, J. J.—(9th November, 1907)—This is a suit by a wife for a declaration that neither her husband, Wadhawa, nor the defendant, Kesar Singh, to whom he is supposed to have transferred her by deed, have conjugal rights against her.

So far as we are aware there is no reported case in which relief of the kind has been claimed by the wife, but following the reasoning in the converse case of a suit by the husband in *Mussammatt Bakhan v. Ala Bakhsh*, 26 P. R., 1903⁽¹⁾, we see no reason for supposing that circumstances might not be established in which such suit would lie. At the same time clear case for relief would have to be made out before the wife could be given a declaratory decree, where, as in the present case, she does not deny the fact of marriage.

The deed in question, dated 11th April 1906, has not been produced, and is said by the defendants to have been destroyed very shortly after it was drawn up. The lower Appellate Court speaks of a copy having been produced, but this is not correct. All that we have to go on as regards the document is secondary evidence of its contents, consisting of an extract from the register of the petition-writer by whom it was written. That evidence is admissible and gives some considerable support to the plaintiff's allegation that her husband did repudiate her and transfer her, without her consent, to the defendant, Kesar Singh. We do not altogether follow the learned Divisional Judge in his explanation of the document as being merely a device by the husband to assist him in discovering his wife's whereabouts. It is not clear how the arrangement would help him if he was merely endea-

(1) s. e., 100 P. L. R. 1903.

vouring to trace his wife, and we have a distinct statement by the plaintiff that Kesar Singh did actually make an unsuccessful attempt to get possession of her in the exercise of the preposterous right asserted by him on the strength of the document.

It follows that so far as the defendant, Kesar Singh, is concerned, we have no hesitation in reversing the Divisional Court's decree, by which the plaintiff's suit has been dismissed absolutely. Kesar Singh has no sort of claim against the woman, and as he has wrongly attempted to assert a claim, she was justified in seeking relief against him. Moreover, the Divisional Judge should have observed that Kesar Singh did not appeal to him from the decree of the first Court in plaintiff's favour against both defendants. The appeal was by Wadhawa alone, and did not proceed on a ground common to both defendants, and the Court has no jurisdiction to set aside the plaintiff's decree against Kesar Singh. To that extent the plaintiff's appeal now before us is bound to succeed.

The question whether the circumstances justify us in also allowing the appeal against the husband, Wadhawa, is more difficult. As is pointed out in *Lachu v. Dal Singh*, 33 P. R., 1896, the question in each case is whether there has, in fact, been such a repudiation of the wife by the husband as amounts to a divorce. No ruling has been traced taking the matter further. The unreported case, Civil Revision No. 1547 of 1900, (*Madho Parshad* against *Mussammatt Modar*) and the rulings (*Jogendronundini Dossee v. Hurry Doss Ghose*, I. L. R., V Cal., 500; *Dadaji Bhikaji v. Rukmabai*, I. L. R., X Bom., 301; *Binda v. Kaunsilia*, I. L. R., XIII All., 126, referred to therein only discuss the circumstances in which decrees for restitution of conjugal rights can be given to either the husband or wife. All these rulings fully recognise that the commission of certain marital offences may be a sufficient answer to such suit when brought, but they do not help us to say how far the offences justify a suit by the opposite party for denial of conjugal rights.

We might be prepared to hold that a clear and public repudiation of his wife by a *Jat* should be treated as divorce, the further question whether a document of repudiation was drawn up being only one among several factors in the case to be considered. But in the present case we cannot overlook the point that wife's claim may not be brought merely to save her from persecution by a husband who had repudiated her. The real object of the suit may be to enable her to legitimise an irregular union with a man for whom she had already forsaken her husband and under whose protection she seems to be still living. Looked at in

this light, the suit has to be closely scrutinized, and we should not be justified in giving the wife a decree unless the fact of repudiation is established beyond all reasonable doubt. We are unable to hold that it has been so established in the present case. Whatever Wadhawa's immediate object may have been in getting a deed of repudiation prepared in 1906, he was clearly acting hastily in the excitement of the moment when his complaint under Section 498, Indian Penal Code, had been dismissed in consequence of failure to trace his wife. She was no party to the transaction. We believe that Wadhawa tore up the document on cooler consideration, and we should be treating an errant wife too favourably if we allowed her the benefit of a decree which is tantamount to divorce without more definite material to go on in support of her allegation that she is the grossly injured party.

Our conclusion is therefore that the appeal can be allowed to this extent only that so much of the decree of the first Court will be restored as gives plaintiff a declaration that the defendant, Kesar Singh, has no conjugal rights against her. The suit, as against the defendant, Wadhawa, will stand dismissed. Plaintiff will recover her costs in the First Court from Kesar Singh. For the rest there have been faults on both sides and the parties will pay their own costs in the lower Appellate Court and in this Court; Kesar Singh is not responsible for the litigation except in the First Court.

It must not be understood from anything we have said that Wadhawa is necessarily entitled to recover possession of his wife. As pointed out above, the wife may have a sufficient answer to his claim, if he should make one, in spite of our inability to hold that she is, as a plaintiff, entitled to immediate relief in the form of declaration which amounts to a divorce.

Appeal partly accepted.

FULL BENCH.

APPELLATE SIDE.

No. 153.

CIVIL.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Reid,
and Mr. Justice Johnstone.*

SURTA, — (PLAINTIFF) — APPELLANT,

versus

FATEH CHAND AND ANOTHER, — (DEFENDANTS) — RESPONDENTS.

CASE NO. 1346 OF 1906.

Punjab Pre-emption Act (II of 1905), Section 2 (8). Retrospective effect of—Punjab General Clauses Act (I of 1898), Section 4—Vendee

having superior right under Punjab Laws Act at the time of sale to plaintiff who is given better right by Punjab Pre-emption Act.

Held, by the Full Bench, that when the vendee had a superior right of pre-emption under the Punjab Laws Act 1872 to the plaintiff claiming pre-emption, the saving clause of Section 2 (8) of the Punjab Pre-emption Act, 1905, protects him as against that plaintiff, even if the plaintiff has superior rights under the Act of 1905.

Per Clark, C. J., and Reid, J., (Johnstone, J. dissentiente.)—That the priorities given by Section 12 of the Punjab Pre-emption Act, 1905, are applicable to a claim to the right of pre-emption with reference to a sale executed before the passing of that Act. *Abas Ali Shah v. Sher Zaman*, 22 P. R., 1908(1), doubted by Johnstone, J.

The vendee who was first cousin of the vendor, a *Mahajan*, was a joint co-sharer with the vendor in the *Khata*, and the plaintiff, who was a *Jat* agriculturist, was occupancy tenant of a part of the land in suit. The sale was effected before, and the suit was instituted after, the Pre-emption Act, 1905, came into force.

Held, that the suit must be dismissed.

First appeal from the decree of Lala Banarsi Das, District Judge, Hissar, dated 29th October 1906.

Lala Lachhmi Narain, Pleader, for Appellant.

Mr. Shadi Lal, Advocate, for Respondents.

ORDER OF REFERENCE TO A FULL BENCH.

JOHNSTONE, J.—(18th June 1907)—This suit for pre-emption of agricultural land in a village was instituted on 16th March 1908. The sale upon which the suit is based was of 12th December 1904 at latest. Regarding this point there was an attempt at controversy in the Court below, but it may be taken as clear that the above date, and not 6th June 1905, when the mutation was sanctioned, is correct. The present Pre-emption Act II of 1905 came into force on 11th May 1905.

The vendor is a *Mahajan* and not an agriculturist. The vendee is his first cousin and the property sold is a half share in a *khata* of the other half of which vendee was already proprietor. Plaintiff is a *Jat* agriculturist and is occupancy-tenant of part of the land in suit. In these circumstances he claims a superior right relying upon the new Act, and he demurs to the price stated.

The pleas put in by the vendee in the Lower Court may be stated thus:—The sale took place when the old Act was in force, *viz.*, Act IV of 1872 (as amended), and under that Act vendee's right was superior

(1) S. C., 122 P. L. R., 1908.

to plaintiffs. The new Act cannot be brought in so as to give plaintiff the superior right, and, even if it can, properly interpreted, it does not give plaintiff such a right as compared with vendee. The price was fixed in good faith and is not more than the market value.

The Court below, holding that cause of action accrued on 12th December 1904, took the view that plaintiff's right did not accrue *after* the commencement of the Act, and that inasmuch as under the old Act no right accrued to plaintiff at all, as compared with vendee, who comes under clause (a) of Section 12 of that Act, it cannot be said that his right accrued *before* the commencement of the new Act. Therefore, the Court held, having regard to Section 2 (3) of the new Act, which runs:—"This Act shall apply to every claim to the right of pre-emption "whether that right has accrued before or after its commencement"—that the new Act does not apply at all, and plaintiff's suit must fail.

Plaintiff has appealed and we have heard arguments. His case, as laid before us, is briefly this:—Plaintiff, as an occupancy tenant, had a "right" under clause (f), Section 12, Act IV of 1872, and therefore it can be said that his "right" accrued *before* the commencement of the new Act. It is conceded that under the old Act vendee's right was superior to plaintiff's, but in the case of suits instituted after the new Act came into force, relative superiority of rights is to be gauged by the new Act. In another way of looking at the matter, plaintiff's right "accrued" at the commencement of this new Act: that Act gave a man in his position a right superior to that of a man in vendee's position, and this right, though it accrued when the new Act created it, should be referred back to date of sale by virtue of Section 2 (3) *afore-said*. Under the new Act plaintiff's right is superior because, though vendee comes into a higher category in Section 12, read alone, of that Act than plaintiff does, Section 11 cuts vendee out altogether.

This reasoning does not commend itself to me. I will first state my views in regard to the meaning of Section 2 (3) of the new Act. The whole sub-section runs thus:—

"Notwithstanding anything to the contrary in Section 4 of the "Punjab General Clauses Act 1898, this Act shall apply to every claim "to the right of pre-emption, whether that right has accrued before or "after its commencement, save and except any such right in respect "of which payment, tender or deposit has been made or a suit has been "brought under any of the provisions hereby repealed."

Among the "provisions hereby repealed" are all the law of pre-emption contained in Act IV of 1872 and its amending Act.

Section 4 of the Punjab General Clauses Act runs thus:— "When this Act or any Punjab Act repeals any enactment, then, unless a different intention appears, the repeal shall not —

"(a)

"(b) affect the previous operation of any enactment so repealed
"or anything duly done or suffered thereunder; or,

"(c) affect any right, privilege.....acquired,
"accrued or incurred under any enactment so repealed; or

"(d)

"(e)

[The portions omitted do not touch the question now before us.]

Authorities as to the meaning and effect of the aforesaid Section 2 (3), Act II of 1905, have been quoted before us; but, before noticing them, I would like to state my own views. Mr. Shadi Lal has laid special stress, and I think rightly, on the words "*whether that right has accrued.*" In my opinion, though plaintiff under the old law came into category (f) of the classes of pre-emptor recognised by that law, yet, inasmuch as under that law his right was inferior to that of the vendee, it cannot be said that to plaintiff any right whatever "accrued" under the old law. Vendee had bought the property. The right of pre-emption is the right to acquire property in preference to other persons—Section 4, Act II of 1905—and I am unable to see how, under the old law, *vendee having bought*, plaintiff had any "right" whatever to acquire this property. Therefore plaintiff cannot claim on the strength of the words "before the commencement of this Act" in Section 2 (3).

Again, it has been repeatedly ruled that a plaintiff, to succeed in a pre-emption suit, must show that he had superior right *at date of sale*—*Muhammad Ayub Khan v. Rure Khan*, 95 P. R., 1901 (1), (and see Section 18 of new Act). On 12th December 1904, plaintiff certainly had, apart from the new Act, no superior right as compared with the vendee; and whatever Section 2 (3) may mean, I cannot admit that it means that a person, who had no right of pre-emption at date of sale apart from that section acquired by the passing of the Act a right to be counted back to the date of sale. The section, if this is its meaning, contravenes established principles of legislation and would cause great

(1) s. c., 125 P. L. R., 1901.

injustice. In my opinion, plaintiff could only succeed in the present case if he could show that both under the old and the new law he had a right of pre-emption better than the vendee. If it be said, that then Section 2 (3) is mere surplusage I would reply that this is not so, for see clause .b), Section 4 of the General Clauses Act, aforesaid, but for Section 2 (3) of Act II of 1905 it might be held that in a case like the present all the provisions of Act IV of 1872 (and amending Act.)—*e. g.*, the letting in of "custom," the rules as to giving notice and so forth—were still to be held as governing the matter.

I would like here to give one illustration of the extreme injustice that would be worked by the new Act if Section 2 (3) is to be interpreted in plaintiff's way. A, owner of a share in a joint holding, wished to sell. Knowing the law of pre-emption, and desirous of avoiding litigation, he offered the bargain in turn to pre-emptors in order of right under Section 12, Act IV of 1872. Finding at last a purchaser B he sold to him in January 1900. Limitation in such a case would be six years under Article 120, Schedule II, Limitation Act 1877. Under the new Act C comes into a higher category in Section 12 than B. C. sues for pre-emption on 1st July 1905. Can it have been intended that such a suit should succeed?

But there is still another way of testing the meaning of Section 2 (3), namely, an appreciation of the intention of the saving clause with which it closes. The intention evidently is that the new Act shall not injure anyone who before its commencement has taken *any substantial step* to secure his rights, those rights being paramount under the old law. But what has the vendee done here? Long before the new Act came into force, he did more than make a "payment, tender or deposit"; he did more than bring a "suit" (which might or might not have succeeded); he emphatically and effectively took the strongest measures to enforce his rights and bought the land out and out, paid the price and took possession. Can it be supposed that the Legislature intended that such a person was to be injured by the new law? If he had made a mere tender of the price and the owner had refused to sell, the new law would not apply to him. He offers to buy, and the offer is accepted, and the land is bought and sold, and yet it is contended that the new law cuts him out.

It is not necessary for me perhaps, holding the above views, to state my opinion of the effect of Section 11 of the new Act. It is contended on behalf of plaintiff that, inasmuch as vendee is not a member

of an agricultural tribe, and also (admittedly) does not come under the proviso to Section 11, no "right of pre-emption" vests in the vendee, and therefore, though apart from Section 11, he may come within a *class* mentioned in Section 12, this cannot avail him, and plaintiff must succeed under clause (c) *fourthly* of that section. Now the wording of the Act leaves much to be desired; but this much seems to me fairly clear, namely, that vendee here is not *asking* for any "right of pre-emption." In a ruling of this Court it has been held that the word "pre-emptors" in Section 14 of the Act does not include vendees, but only persons other than vendees, who are *claiming* pre-emption. It seems to me reasonable to hold here too that Section 12 (or rather I should say Section 11) applies only to a person claiming pre-emption. Where the sale does not contravene the Punjab Alienation of Land Act, I cannot see why the Legislature should have intended to cut out the vendee by means of Section 11, Punjab Pre-emption Act, which Section, in my opinion, was only intended to prevent evasions of the former Act.

However, as I have said, I need not give a final opinion on this point and I do not press it.

Mr. Lachmi Narain, in enforcing his views, quoted *Thakaria v. Daya Ram*, 143 P. R., 1907 ⁽¹⁾, which does not help him at all. The dispute there was as to the Law of Limitation applicable, and it was distinctly held that plaintiff *on his allegations* had a right of pre-emption both under the old and the new law. He also quoted *Bahadar v. Alia*, 30 P. R., 1907 ⁽²⁾, in which it was merely laid down that where a right of pre-emption accrued to a plaintiff under the old law upon a transaction occurring before the commencement of the new Act, and under the new Act plaintiff has no right of pre-emption a suit brought by him after the commencement of the new Act must fail. He also quoted *Ram Pershad v. Hira*, 87 P. R., 1906 ⁽³⁾, by way of further authority that the new Act extinguishes rights. This is not denied by any one. But he also put forward *Abas Ali Shah v. Sher Zaman*, 22 P. R., 1908 ⁽⁴⁾. There plaintiff, on 6th January 1906, sued for pre-emption on a sale of 7th January 1901, (a) as a co-sharer, and (b) as a collateral of vendor. The Division Bench held that the new Act was meant to apply to every claim to the right of pre-emption the words "whether that right, &c.," in Section 2 ⁽³⁾ being merely an amplification of the

(1) s. c., 135 P. L. R., 1908.

(2) s. c., 19 P. L. R., 1908.

(3) s. c., 65 P. L. R., 1907,

(4) s. c., 122 P. L. R., 1908.

meaning. It then went on to find that where the Act confers a right of pre-emption on a person who had it not before, it may be said that the right "accrued" after the commencement of the Act; and that the claim as collateral was barred by time under Section 29 of the Act while the claim as co-sharer, being under the old Act, was within time under Section 28 of the new Act. After careful consideration of the matter I cannot see my way to assenting to these views of the law. I have stated my own views and need not re-state them.

I understand that my learned colleague thinks the matter of sufficient importance for reference to a Full Bench and I have no objection to the adoption of this course.

CHATTERJI, J.—(18th June 1907).—The case is referred to Full Bench on the question of construction of Section 2 (3) of the Punjab Pre-emption Act and cognate points.

JUDGMENT OF THE FULL BENCH.

CLARK, C. J.—(21st October 1907).—The points referred to the Full Bench have not been definitely stated in the referring order, but the points arising in the case may be stated as follows:—

I. Are the priorities given by Section 12 of the Punjab Pre-emption Act, 1905, applicable to a claim to the right of pre-emption with reference to a sale executed before the passing of that Act?

II. When the vendee had a superior right of pre-emption under the Punjab Laws Act 1872, to the plaintiff claiming pre-emption, does the saving clause of Section 2 (3) of the 1905 Act protect him as against that plaintiff, who has superior rights under the Act of 1905?

A decision on the second point is sufficient to dispose of this appeal, and I therefore propose to deal with it first.

The plaintiff in this case is an occupancy tenant on part of the land sold, while the vendee was a co-sharer in the land sold, but does not belong to an agricultural tribe.

If the vendee who had the superior right of pre-emption to plaintiff under the Act of 1872 had tendered or paid the price as provided in Section 14 of the Act of 1872, he would come under the saving part of clause 2 (3) of the Act of 1905, and it seems to me that *a fortiori* by having bought the land outright, he brings himself within that saving part.

Consequently plaintiff's claim to pre-emption must be decided under the Act of 1872 and under that Act vendee's claim is superior to his, and the appeal and suit must be dismissed.

This decision is sufficient to dispose of the appeal, but as point I was argued at length I propose to express my opinion on that point also. The point has been decided in *Abas A/i Shah v. Sher Zaman* 22 P. R., 1908 (1), that the priorities do apply to sales executed before the commencement of the Act but the referring order casts doubt on the correctness of that decision and Mr. Shadi Lal for defendant argues that the decision in that case is wrong.

The point is whether Section 2 (3) of the Act of 1905 makes the Act retrospective as regards sales executed before the commencement of the Act.

The general section preventing Acts from having retrospective effect, unless a different intention appears, is Section 4 of the Punjab General Clauses Act, 1898. Now what Section 2 (3) of the Act of 1905 says is, that notwithstanding anything contained in that Section, the Act of 1905 "shall apply to every claim to the right of pre-emption" "whether that right has accrued before or after its commencement" except such rights as have been asserted either by making a tender, etc., or bringing a suit.

The meaning seems to me clear that the Act was to apply to all claims to the right of pre-emption, except those in which the right has been asserted in some definite way.

The main object of the Act was to alter the priorities as regards rights of pre-emption of agricultural land, and to amend the law as regards pre-emption of urban immoveable property, and it is hardly conceivable that this language would have been used if it was not intended that it should apply to the main object of the Act. Mr. Shadi Lal has argued that Section 2 (3) was not intended to apply to this main object, but to collateral matters such as it being retrospective as regards conditional sales of agricultural land as held in *Ram Pershad v. Hira*, 87 P. R., 1906 (2), and *Bahzdar v. Alia* 30 P. R., 1907(3).

Now the Act is divided into five Chapters—

Chapter I—Preliminary.

„ II—General Provisions.

„ III—Persons in whom the right of pre-emption rests.

„ IV—Procedure.

„ V—Limitation.

(1) s. c., 122 P. L. R., 1908.

(2) s. c., 19 P. L. R., 1908.

(3) s. c., 65 P. L. R., 1907.

Mr. Shadi Lal's argument would make the Act inapplicable to Chapter III and applicable to the other Chapters, but Chapter III is the one that contains nearly the whole object of the Act both as regards agricultural land and urban immoveable property, and if it was intended that the retrospective effect should not apply to that Chapter, such language could not have been used.

Mr. Shadi Lal further argued that such retrospective provisions being opposed to the general maxims of legislation, should not be given effect to unless the language was unmistakable. I think that the language is sufficiently clear to make the language unmistakable; he also argued that as it would have been possible if the Act was to apply to sales previous to the commencement of the Act for a person who had no right of pre-emption before the Act, to upset sales that had been acquiesced in for five or six years, such a result could not have been intended. It seems to me not improbable that this danger was not foreseen, and I do not think this advantage has up to the present been used by anyone, and it cannot be used in future owing to the limitation provisions.

It was further argued by him that heretofore the Courts have always held that to enforce a claim to pre-emption, the pre-emptor must have had the right at the time of sale. This is true, but it does not prevent the legislature from conferring that right on persons who had not got it at the time of sale, and this is what, I think, the Act has done.

The difficulty in the case comes from the use in Section 2 (3) of the words "whether that right has accrued before or after the commencement," after the words "this Act shall apply to *every claim to the right of "pre-emption"* I do not think that the former words are intended to limit the generality of the words "every claim to the right of pre-emption."

The Act must of course apply to every claim accrued after the commencement of the Act, and, I think, the insertion of the words "accrued before" is only an inaccurate way of saying that the Act should not be confined to rights accrued after the commencement of the Act.

It may be noted that the words "rights accrued" are the words used in Section 4 (c) of the Punjab General Clauses Act, 1898, and they were probably used in Section 2 (3) to contradict the rights preserved under the General Clauses Act, or rather to show that those

rights were not to be preserved as regards matters dealt with by the Act of 1905.

I would answer point I by saying that the priorities given by Section 12 of the Punjab Pre-emption Act 1905, are applicable to a claim to the right of pre-emption with reference to a sale executed before the commencement of the Act

REID, J.—(26th October, 1907.)—I concur in holding that, but for the saving clause in the concluding lines of Section 2(3) of the Punjab Pre-emption Act, the plaintiff-appellant would have been entitled to a decree, and that his suit was defeated by that clause. The vendee was first cousin of the vendor, a Mahajan, and the appellant was Jat agriculturist, the subject of the sale being agricultural land.

The sale was effected before, and the suit was instituted after, the Pre-emption Act came into force.

Under Section 12 (a) of the Punjab Laws Act, the vendee had a right superior to that of the appellant, who was entitled under Section 12 (f).

Under Section 12 (b) of the Pre-emption Act, the right of the vendee would have been superior to that of the appellant, but for Section 11 of the Act, if applicable, inasmuch as the appellants' right is under Section 12 (c) fourthly.

The first question for consideration is whether Section 11, which provides that no person other than a member of an agricultural tribe shall have a right of pre-emption in respect of agricultural land, subject to a proviso, which does not help the vendee, is applicable.

This question must, in my opinion, be answered in the affirmative.

The words in Section 2 (3) of the Pre-emption Act "this Act shall apply to every claim" meet, in my opinion, all argument based on the date on which the appellant's right to pre-empt accrued (to adhere to the language of the Act), and the words "whether that right has accrued before or after its commencement" were in my opinion, though the intention of the framers of the Act is by no means happily expressed; intended to emphasise the exclusion of the Act from the provisions of Section 4 of the Punjab General Clauses Act of 1898, and to make the Act absolutely retrospective. I am unable to see any reason for holding that the words cited were intended to limit the application of the Act to rights which accrued before or after the Act came into force, and to exclude its application from cases in which the superior right sought to be established was brought in to existence by the Act itself.

"A claim to a right of pre-emption" cannot, in my opinion, be held to mean "a right of pre-emption" and the claim must be adjudicated on by the light of the new Act, if preferred after that Act came into force.

Counsel for the respondent cited authority, including Maxwell on the Interpretation of Statutes, Edition 4, pages 121, 122, 285, 322, 314, for the propositions that absurdity and injustice should, if possible, be defeated, that law need not necessarily be held to be retrospective, and that contradiction should, if possible, be defeated; but there is, in my opinion, no possibility of interpreting Section 2 (3) otherwise than as making the Act retrospective and applicable to all suits for pre-emption instituted after it came into force.

The infelicity of the language used may have been due to a desire to follow closely the language of Section 4 of the Punjab General Clauses Act, "unless a different intention appears the repeal shall not....." "affect any right acquired, accrued.....under any enactment so repealed."

The appellant had a right to pre-emption under both Acts, provided that no superior right was established, and the question, whether his claim was defeated by the existence of a superior right, had to be decided by the Court in which his suit was instituted.

Counsel for respondent cited *Muhammad Ayub Khan v. Rure Khan*, 95 P. R., 1901⁽¹⁾; *Khan v. Mahanda*, 32 P. R., 1902⁽²⁾; *Muhammad Navaz Khan v. Mussammatt Bobo Sahib*, 44 P. R., 1903⁽³⁾; *Sheo Narain v. Hira*, I. L. R., VII All., 535, F. B.; and *Janki Prasad v. Ishar Das* I. L. R., XXI All., 374, F. B.; for the proposition that the suit must be dismissed on the ground that the plaintiff-appellant had no cause of action at the date of suit, and relied specially on the opinion expressed by Strachey, C. J., in the last cited case, that, to maintain a suit, for pre-emption, the plaintiff must show, not only that the sale gave him a cause of action, but that the cause of action still subsisted at the date of the institution of the suit.

The facts dealt with by these authorities differ so widely from those of the present case that they do not, in my opinion, help the respondent, and the fact that a suit instituted by the appellant before the new Act came into force would have been defeated by the respondents' superior right, affords, in my opinion, no answer to the argument that the new Act applies to the suit instituted by the appellant after it came into force.

(1) S. C., 125 P. L. R., 1901.

(2) S. C., 30 P. L. R., 1902.

(3) S. C., 75 P. L. R., 1903.

To hold that a party who sues after that occurrence must prove that he had a right superior to the defendants' both at the date of sale and at the date of suit is, in my opinion, opposed to the terms of the sub-section. The date of suit, not the date of sale, has to be looked to for the law applicable to the claim.

As I have already held, the alleged injustice of applying the provisions of the new Act in such a manner as to deprive person of superior rights enjoyed by them before the Act was passed, cannot be considered in the face of the terms of the sub-section ; and the argument, that the effect of applying the provisions of the Act to sales effected before it came into force will be to revive stale claims, is met by the facts that Article 120 of the Limitation Act has been made inapplicable and that the year of grace allowed by Section 28 of the Pre-emption Act for suits previously governed by that article has now expired. In any case the argument cannot be considered in the face of the language of the sub-section, and the maximum "Hard cases make bad law" must be kept in mind.

I see no reason for doubting the correctness of the decision in *Abas Ali Shah v. Sher Zaman*, 22 P.R., 1908⁽¹⁾ and *Bahadur v. Alia* and I adhere to those decisions and answers the first question in the affirmative.

On the second question I am satisfied that the respondent made payment in respect of his right of pre-emption within the terms of the sub-section, when he purchased the property in suit before the Pre-emption Act came into force, and that the saving clause of the sub-section consequently excludes the application of the provisions of the Act from this suit.

I would consequently dismiss the appeal with costs.

JOHNSTONE, J.—(28th October, 1907).—I concur with my learned brethren in their answer to question II as stated by the Chief Judge. On the other question I need hardly insist upon the view I stated on 18th June 1907 in my order of that date as the answer to question II settles the case. But with all deference I am still inclined to hold that the words "Whether that the right has accrued, etc." occurring in Section 2 (3) of the Act, do limit the previous words "every claim to the right of pre-emption."

As regards Section 11 it seems to me to be manifest that it cannot by any possibility be used to defeat a non-agricultural vendee, who has bought before the present Act came into force, for see our decision on question II. That section will, of course, prevent the success of a suit by

(1) s. c., 122 P. L. R., 1908.

a non-agriculturist, who has delayed suing till after the Act came into force.

The appeal stands dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 154.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

NAWAB AHSAN ULLAH KHAN AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

versus

NAWAB MUHAMMAD IBRAHIM ALI KHAN,—(DEFENDANT),—
RESPONDENT.

CASE No. 177 OF 1905.

Custom—Muhammadan Law—Family custom—Succession—Primo-geniture—Kunjpura estate—Property appertaining to State before 1849 when the State ceased to exist as semi independent State and property acquired since—Maintenance.

Held, that by family custom the eldest son succeeded to all the property of the Kunjpura State which appertained to it before it ceased to exist as a *semi* independent State in 1849 and the other members of the family were not entitled to claim any share by partition therein but could claim maintenance only.

Held, also, that Muhammadan Law governed the succession of property acquired since the State ceased to exist as a *semi* independent State.

First appeal from the order of District Judge, Karnal, dated 30th November, 1904, dismissing plaintiff's claim.

Rai Sahib Lala Sukh Dyal, Lala Chuni Lal and Pandit Hirde Narain,
Pleaders for Appellants

Messrs Kirkpatrick, Shadi Lal and Shah Nawaz, Advocates,
for Respondent.

JUDGMENT.

ROBERTSON AND LAL CHAND, JJ.—(21st December, 1906).—The parties to this suit are all sons of the late Muhammad Ali Khan Rais of Kunjpura. The plaintiffs are the younger sons of Muhammad Ali Khan. Defendant is the eldest son, who has, on being released from the Court of Wards, taken possession of the whole of his father's property. The plaintiffs claim to be entitled to share in the inheritance according to the rules of Muhammadan Law, and the defendant resists their claims on the ground

that in the Kunjpura family the custom of primogeniture obtains and that he, being eldest son and Chief of Kunjpura, is entitled to the possession of the whole of his father's estate, moveable and immoveable, and that all that the plaintiffs could claim from him would be reasonable maintenance. The question before us for decision is therefore simply: In the Kunjpura family does the rule of primogeniture prevail as a custom having the force of law in regard to all or any of the property claimed, or is the Muhammadan Law the rule of succession?

The onus of proving that a custom of primogeniture obtains clearly lay upon the Rais, defendant. We will proceed at once to consider whether or not the custom has been in any way established, and if so, to what extent.

As regards the history of the family, an account of it will be found at page 168 of Massy's "Chiefs and families of note in the Punjab" a book usually referred to as Massy's Punjab Chiefs. This account is not accepted as entirely accurate by either side but it has been referred to by both and gives no doubt a fairly accurate general account of the family.

A pedigree table of the family will be found at page 5 of the paper book Part I. The first person with whom we have to deal is the founder of the family, Najabat Khan. The Kunjpuras are said to be Rohila Pathans of Eusafzai origion. Najabat Khan about the year 1748 recieved a *sanad* from Abdul Shah Abdali, who was then dominant in the country north of Dehli. In this *sanad* the title of Khan is conferred on Najabat Khan and 149 villages which are stated to already belong to him are also granted to him as Jagir, and he was granted the enjoyment of the revenue of these villages in addition to the proprietary right or *biswadari* of the villages which he had already acquired. In the *sanad* it was laid upon Najabat Khan that he should protect the boundaries of his Ilaqqa and keep off theives and trespassers and preserve peace. The wording of this *sanad* is important as it makes it clear that Najabat Khan was already proprietor in possession of these villages, and was granted a Jagir of them also in view of his policing them properly and acting as a sort of warder of the marshes. Kunjpura lies about 100 miles, roughly, north of Delhi, only a few miles north of Karnal and within 50 miles or so of Panipat, where the great battle between Ahmad Shah Durrani and the Mahrattas, which shattered the power of both took place in 1760. Much fighting took place about this tract in the years following the grant of the *sanad*. Sikh Sardars encroached upon

Kunjpura lands and a convulsive struggle was going on. Najabat Ali Khan died about 1760, it is said in defending a tower against the Mahrattas, and was succeeded by his son Daler Khan. He had seven sons, and it now becomes necessary to ascertain, as far as may be, what occurred on his death. Kamal Khan one of his sons is said to have obtained some villages which were wrested from him by the Sikhs and recovered by Daler Khan, and Ikhtyar Khan is said also to have had a separate holding, but the whole matter is one of tradition only, and that extremely vague. The separate holdings of Kamal Khan and Ikhtyar Khan have left no trace in the family history and it is quite impossible to say upon what basis they were acquired, if they ever were so. Daler Khan seems to have undergone many vicissitudes and to have lost much of his estate before he died in 1773 and at first Gulsher Khan lost still more. But, according to Massy, about 1787 the fortunes of the family began to improve, and at the very end of the century Gulsher Khan was undoubtedly established as Nawab of Kunjpura and he was so recognized by General Perron.

Daler-Khan left at least four sons, of these Gulsher Khan, Karam Sher Khan and Shamsheer Khan appear to have been full brothers and Game Khan a half brother.

Karam Sher Khan undoubtedly obtained certain villages for himself of about Rs. 6,000 in annual value and succeeded in separating this off from the "estate." The times were troublous and it is suggested that Karam Sher himself acquired these villages or recovered them from the Sikhs by his own prowess. Further, Karam Sher Khan outlived Gulsher Khan and Rahmat Khan who succeeded Gulsher Khan, was married to Karam Sher Khan's daughter. Be the reason what it may, and obviously more than one plausible explanation can be given, Karam Sher Khan got his possession separated off. They were not resumed at his death and they have been succeeded to by his descendants in accordance with Muhammadan Law. It is, however, to be noted that according to the orders of Government and the entries in records of rights prepared at settlement, *i.e.*, in the settlement records, it is provided that the lands are to be continued to Karam Sher Khan's family so long as any of his descendants remain and are then to revert to the Nawab of Kunjpura.

None of Karam Sher Khan's brothers got any separate portion.

We next come to one of the most important occurrence in the family history.

On the death of Gul Sher Khan he was succeeded as Chief by Rahmat Khan who, it is clear, was exercising many of the attributes of independent Chiefship or sovereignty and he was confirmed as an independent Chief in 1811 by a proclamation of the Governor-General. From the records it appears that Rahmat Khan was a weak individual, while Ghulam Moy-ud-Din, his full brother, was a very strong and self assertive one. There were also three other sons of Gul Sher Khan who were half brothers of Rahmat Khan and Ghulam Moy-ud-Din Khan. It is quite clear that these three at any rate never got any "share" according to Muhammadan Law, but only somewhat meagre maintenance. The case of Ghulam Moy-ud-Din, however, requires careful examination. It is quite clear that Ghulam Moy-ud-Din never succeeded peaceably to his share under Muhammadan Law. He and his brother Rahmat Khan quarrelled violently and Ghulam Moy-ud-Din took all he could get. Matters got so strained that Political Authorities felt called upon to interfere and the disputes between the brothers were submitted to arbitration, the arbitrators apparently being Sir Theophites Metcalfe and Mr. Fraser. The reference to arbitration, and the award itself, are not traceable now, but there is upon the record an agreement in accordance with the award—in which the Nawab agrees to give five villages to Ghulam Moy-ud-Din Khan instead of the Rs. 4,500 already fixed "*banabar issaraf as kammi maddat hal.*" Whatever exactly that expression may mean, it is quite clear, however, not only from this, but other papers on the record that whatever was granted to, or taken by, Ghulam Moy-ud-Din Khan, was not his share in accordance with strict Muhammadan Law. That document is dated 9th July, 1811. There is another letter said to be from Rahmat Khan to Ghulam Moy-ud-Din Khan on the subject of the fixing of boundaries dated 4th Ziulhaj 1231=1815 which is relied on for the appellants, but this letter has never been proved or admitted to be authentic, and, as it was never produced in a long series of disputes we are unable to accept it as genuine now.

In 1822, however, further disputes arose, and Mr. W. Fraser addressed Mr. A. Ross, Agent to the Governor-General, on the subject in a letter printed at page 10, of the first paper book A. A younger brother of Rahmat Khan and Ghulam Moy-ud-Din Khan had applied to the Government to induce his brothers, half brother, that is, Rahmat Khan and Ghulam Moy-ud-Din to give him maintenance and an order had been passed that Rahmat Khan was to pay $\frac{2}{3}$ and Ghulam Moy-ud-

Din $\frac{1}{3}$ rd of the maintenance allowance, Rs. 200 granted, as the brothers had divided the inheritance in those shares.

Ghulam Moy-ud-Din objected altogether to this, alleging that he had not received $\frac{1}{3}$ rd share and that what he had got was not a share but merely maintenance which should not be burdened in favour of other relatives. Mr. Fraser's letter setting forth Ghulam Moy-ud-Din's case is curiously violent and the facts are dealt with fully, in a letter from R. Ross, Deputy Superintendent, to A. Ross, Agent to the Governor-General, dated 2nd July, 1822.

The position, and the reasons why Ghulam Moy-ud-Din was allotted what was given him are however made clear in the letter of Sir Charles Metcalfe, dated 4th December, 1822. He says: "Had the question been as to the right of Ghulam Moy-ud-Din to a portion, as one of several younger brothers, he must, I conceive, have received smaller provisions than what he obtained. But that was not the question, nor was the matter settled, to the best of my recollections, on any ground of right. The adjustment was simply an agreement between the parties both yielding to the opinions of the arbitrators

"Ghulam Moy-ud-Din Khan was more in the character of a rival than of a younger brother. The two brothers were at war. The arrangement concluded between them was considered by me more as a treaty of peace between contending parties than as a legal settlement of mutual rights." (paper book A page 16). This letter perhaps throws some light upon the reason why Karain Sher Khan obtained separate rights before the advent of British rule. See Massy page 173.

It is not necessary to go through all the correspondence on the subject which is printed at page 12 to 16 inclusive in the first paper book A, and at pages 38 to 44 of the 4th paper book D.

A letter from Sir David Ochterlony, dated 13th July, 1822, shows that in his opinion when the arbitration was carried out between Ghulam Moy-ud-Din Khan and the Nawab the claims of other younger brothers were entirely overlooked and their existence not brought to the notice of the arbitrators.

The final proposals of the Agent to the Governor-General sent up for the order of Government are contained in a letter dated 13th August 1822 printed at page 40 of paper book D. In this connection it is important to notice first however that in the letter of Mr. W. Fraser

which starts this correspondence, to A. Ross, A. G. G., Delhi, and which states Ghulam Moy-ud-Din's case on his behalf, expressions are frequent which clearly show that Ghulam Moy-ud-Din's claim was always to proper maintenance, and that his right to a share according to Muhammadan Law was never even thought of.

In para. 3 he says "so far back as 1806, Rahmat Khan and Ghulam Moy-ud-Din Khan had disputes which terminated in an open rupture. They originated in Ghulam Moy-ud-Din Khan's claim requiring from his brothers sufficient maintenance

This was refused by Rahmat Khan, and he seized some villages by force ".....Mr. Metcalfe and myself are both at hand to certify that the assignment to Ghulam Moy-ud-din Khan was entirely for the purpose of providing him with a proper maintenance, and not intended to have the appearance even of a division or separation of a share from the property of the late Gulsher Khan".....For Ghulam Moy-ud-Din Khan I believe has scarcely an income amounting to a 10th part of the income of his father's property and what he does possess has always been considered in the same light as the maintenance now assigned to Rahmat Khan's brother (*i. e.*, the maintenance in the payment of which Ghulam Moy-ud-Din objected to share). As Mr Fraser was a strong partizan of Ghulam Moy-ud-Din's and was urging all he knew in his favour, it must clearly be accepted as a fact that Ghulam Moy-ud-Din got what he got from Rahmat Khan, not as a share in one sense of Muhammadan Law, but as suitable maintenance. Sir Charles Metcalfe does not support all that Mr Fraser says, and Captain Ross in his letter dated 2nd July 1822 estimates the actual value of this allotment to Ghulam Moy-ud-Din as equal to about $\frac{1}{4}$ th of the whole Rs. 12,000 as compared to Rs. 30,000 *i. e.*, Rs. 12,000 out of Rs. 42,000 (paper book A page 14)

In referring the question as to whether the maintenance allowance to Ghulam Rasul Khan, Ghulam Moy-ud-Din Khan and Sher Ali Khan, the younger and half brothers of Rahmat Khan, should be paid by Rahmat Khan Nawab alone, or by him and by Ghulam Moy-ud-Din Khan his brother in the proportion of 2 shares to 1: The subject was discussed in some detail by the A. G. G. This is printed at page 40 of the paper book D., and is important. The estimate of the annual value of the property held by the Nawab is here given at not less than Rs. 42,500 and of that held by Ghulam Moy-ud-Din at Rs. 10,500 or about $\frac{1}{5}$ th of the whole. In para 7 of that letter A. G. G., says "they the arbitrators

could not have contemplated that any portion of that provision (*i. e.*, the provision made for Ghulam Moy-ud-Din) would ever be demanded from him, or that the Chief was to be relieved from any part of the burden of maintaining his brother while the usage of the family and the implied conditions on which he held the chiefship imposed upon him ".....

Finally he recommended a reduction in the allowance to be made to the 3 younger half brothers from Rs. 2,400 to Rs. 1,500 and that the whole should be paid by the Nawab Rahmat Khan. The letter concludes as follows:—

"By an arrangement thus modified Nawab Rahmat Khan would not have to pay so much by Rs. 100 as the sum he has already consented to pay, neither could Ghulam Rasul Khan and his brother object that their provision was reduced to less amount than they are entitled to, while Ghulam Moy-ud-Din being excused from contributing, the usage of the family, and also the conditions of the deed under which he enjoys his present income understood to have been granted by the Resident, would remain inviolate." These proposals were accepted by the Governor-General in a letter dated 15th January, 1833 (pages 43, 44 of paper book D.).

It is quite clear from the discussion and decision in the case that Ghulam Moy-ud-Din Khan himself took up the position that what he had received, large as it was, was only suitable maintenance, the amount of which has been settled by arbitration, that the three younger brothers, who although half brothers, would under Muhammadan Law take an equal share with their other brothers in their father's estate claimed maintenance, and only received an allowance of Rs. 2,000 among them, and that the officers who dealt with the case accepted the family usage to be that the person holding the Chiefship for the time being was bound to provide suitable maintenances for his younger brothers, out of the father's estate to which he alone succeeded. The learned pleader for the appellant could only urge in depreciation of the effect of this instance that Ghulam Moy-ud-Din took up the position that his grant was for maintenance only to suit his own ends and to avoid contributing to his younger brothers maintenance, but even if this were so the fact remains that he did take up this position, and that the British officers held that his contention was in accordance with the family usage. And no explanation whatever is given for the fact that the three younger brothers, equally entitled, clearly never set up any claim to anything but mainte-

nances to which they did set up a claim which was granted to the extent of Rs. 2,000 only. Ghulam Moy-ud-Din Khan died in 1841, Muhammad Yar Khan was a minor, but strong claims were put forward on his behalf to succeed to the whole property of Ghulam Moy-ud-Din Khan. The correspondence and orders in this case will be found printed at page 5 *et seq* of paper book E. The letter of G. Clark, A. G. G., dated 21st July 1841, is important. In that letter the opinion of the writer that Ghulam Moy-ud-Din had got far more than he was entitled to in 1806-1811 is clearly indicated, he says in para 4 "hence this office has ever since been frequently engaged in investigating or preventing the mischievous consequences of his constant endeavours and occasional claims to assume a share also of the authority of the Chief. He is spoken of as a usurper, clever and ambitious, and his nephew Bahadar Jang Khan who succeeded Rahmat Khan in 1822, as a man of very mean abilities."

In para. 6 G. Clark remarks, "if the British Government would maintain the petty chiefs in the rights which it finds them enjoying, the appeals of the younger brothers to its intercession should never be listened to beyond the point of securing to them such amount of provision as the usage of the family sanctions".....

In paras 10, 11 and 12 he says.

"10. The letter of Sir D. Ochterlony, dated 13th July, 1822 and in particular paragraphs 6 and 7 and the letter of Mr. A. Ross, dated the 13th August, 1823, contain, I think, all that is necessary to establish the rights of the *Raises* now to recover, as he claims to do, some portion of this assignment. Mr. Ross, it will be observed, states that "the provision so assigned was judged by the arbitrators to be necessary for his (Mohy-ud-Din Khan's) support in a manner suitable to his station, as full brother of the chief" and the annexed document relating to their decision will be found to contain nothing from which it can be inferred that even they contemplated that this grant should descend entirely to Mohy-ud-Din Khan's successors.

"11. The ordinary provision for a younger brother of this family is five wells of land. In the present case the *Raises* do not seem desirous of reducing the only child of his late uncle to this level. He seems mindful of the consideration in which his uncle was held by Europeans and rather to wish that I should suggest some means of reconciling him to a branch of his family from which as yet he has lived estranged partly and partly owing to his having had advisers of his own surrounding him and partly owing to the bitterness of his late uncle's temper.

"12. Should the Hon'ble the Lieutenant-Governor approve of the opinion which I have taken the liberty to express upon this subject, he may probably consider that the 7 wells and Biana the two first in the list of the lands of the deceased, would form suitable provision for his child and that the rest should revert to the Chiefship. I believe the *Raises* would be satisfied with this revision, but I have no hope that the present advisers of the child who were vakils, seeking for a long litigation of point will ever admit that anything less than the whole patrimony is satisfactory to them.

The reply of the local Government to this was as follows :—"2. In reply I am desired to inform you that from a perusal of the correspondence forwarded with your letter under acknowledgment, especially of the despatch of the Agent of Delhi of December 1836, the Hon'ble the Lieutenant-Governor is of opinion that the child in question has no greater claim to share of the patrimony than any other cadet of the family. Under this view of the case His Honour concurs with you and considering that portion of land you proposed assigning him would be a suitable provision for his maintenance while the remainder of the land will revert to the Chiefship."

Here it is again clear that the British Officials and the Government held Ghulam Mohy-ud-Din's grant to have been maintenance only and accordingly much the greater part of it was resumed on his death.

This Muhammad Yar Khan brought a suit in April, 1851, for certain land &c., which he alleged had gone to Ghulam Mohy-ud-Din his father on partition. That suit was dismissed, it being remarked in the judgment of the Commissioner and Superintendent of the Cis Sutlej Division, that "whatever the appellant got previously it was on account of maintenance allowance the appellant himself admitted this fact. Even if he had not admitted it, still the maintenance allowance cannot be said to be a share as stated by the appellant in his petition of appeal."

Here we find a definite claim to a share fought out and dismissed, it being clearly decided that maintenance only can be claimed. A further claim was dismissed by the Deputy Collector of Thanesar on 28th November, 1853, (page 57 paper book A).

After Muhammad Yar Khan's death in 1882 we find that the then Nawab Muhammad Ali Khan sued Ahmad Hussain Khan and Muhammad Hassan Khan, sons of Muhammad Yar Khan, to recover the lands grant-

ed to Muhammad Yar Khan for maintenance, and a suit was decreed by the Subordinate Judge of Karnal on 11th July, 1885, (paper book A page 64). There was clear issue as to whether or not the land in dispute which formed part of the grant to Ghulam Mohy-ud-Din Khan and had been continued to Muhammad Yar Khan had been granted as maintenance or not, and it was judicially decided that it had been so granted. This concludes the history of the grant to Ghulam Mohy-ud-Din and the claims of his descendants.

It will be most convenient, first to deal with all the cases in which claims have been actually made either by petition to political or revenue or executive authorities, or by regular suit, by any of the members of this family against the Nawab. We have dealt with Karam Sher Khan's case and with Ghulam Mohy-ud-Din's and his descendants Nawab Rahmat Khan had four sons. Bahadar Jang Khan first succeeded as Nawab and on his death in 1828 his brother Ghulam Ali Khan succeeded him. Ghulam Ali Khan died in 1841 and was succeeded by Muhammad Ali Khan in 1849.....in the latter part of the year after a proclamation had been issued by the Governor-General taking away all kinds of sovereign rights from the Nawab of Kunjpura—to the effect of this proclamation we shall return later. Muhammad Ali Khan died in 1866 and it is his property which is now in dispute, his sons having been taken over by the Court of Wards.

To return to the sons of Rahmat Khan. In 1833 Shahbaz Khan sued his brother Ghulam Ali Khan the then Nawab for partition. In the judgment it is noted that the defendant, Nawab Ghulam Ali Khan, stated the custom to be, that, the plaintiff, his brother, should receive five wells in maintenance and it is mentioned that when Bahadar Jang Khan was Nawab his brother Ghulam Ali Khan had himself taken five wells for maintenance and now having become Nawab he proposed to pass on these five wells for maintenance to his younger brother the plaintiff Shahbaz Khan. It was noted that no suit had been brought in Bahadar Jang Khan's time and that if Shahbaz Khan was entitled to partition so was Janbaz Khan who had brought no such claim. The final order was: "In my opinion it is proper that the plaintiff should be obedient to the defendant, his elder brother, who has agreed to fix maintenance according to his promise." This decision was by Thomas Metcalfe on 26th July, 1836, as Agent at Shahjahanabad. This was approved by the Local Government who requested the Nawab to do

justice to his brother, by fixing his maintenance according to the custom and practice obtaining among the other *Raises*, of Kunjpura" (pages 16 to 18 A).

In 1850, after the proclamation of 1849, again we find Shahbaz Khan asserting his claims against Muhammad Ali Khan Nawab, and again his suit was dismissed on the ground that the state lands were not liable to partition and that only grants or maintenance had ever been made.

On appeal (paper book A. page 36) it was held by the Settlement Officer that....." It is proved by all the documents sent from Agent's Office that the land attached to the said wells and cash amounts were fixed merely on account of maintenance" and the appeal dismissed.

Again we find Shahbaz Khan and his brother, Janbaz Khan with others, claiming *samindari* and *biswadari* rights in village Sharafabad. The Commissioner's order is dated 28th April, 1851, and from this there was an appeal to the Board of Administration which was decided on 27th August, 1852. This decision is of some importance especially in connection with one part of the case. *Mauza* Sharafabad it is stated had been acquired by Nawab Ahmad Khan.

In his judgment dated 27th August, 1852, the second member of the Board (Mr. John afterwards Lord Lawrence) says "on an appeal having been filed previously I sent for the files, on receipt of the files prepared in the Settlement Department and Commissioner's Office, I, for the reasons given in my judgment dated 8th January, 1852, held that *samindari* rights did not belong to the estate, that like other moveable and immoveable property it should be given by right of inheritance according to the Muhammadan Law and that all the descendants of Nawab Rahmat Khan who had acquired the *samindari* right in it. All the three members of the Board concurred in the above points and for the final decision of the case the possession of Janbaz Khan and Shahbaz Khan was relied upon, that is whether they held possession in Sharafabad or not." The parties, and we ourselves, have made great efforts to find this judgment of 8th January, 1852, but it is not forthcoming. The suit was finally dismissed on the ground that Janbaz and Shahbaz had not had possession within 12 years. (Paper Book A page 55). This concludes the history of the claim of Shahbaz.

Janbaz Khan also brother of Rahmat Khan sued in 1850 for one-third share out of the property attached to the Kunjpura estate and for

entries to be made in Settlement Records in his name as regards $\frac{1}{3}$ rd share. This claim was dismissed on the ground that it was quite clear that the estate was not liable to partition and the fact that Ghulam Mohy-ud-Din Khan had "in his applications sent to the Government clearly alleged that he had received no share out of the estate, that whatever he received was by way of maintenance allowance, that it was a great hardship if he was forced to pay for the maintenance of his other brothers.....as mentioned in the letter of Mr. Lawrence to the Agent to the Governor-General, dated 12th August, 1852, was relied on *inter alia*, the suit dismissed by Mr. W. Wynyard, Settlement Officer in Cis Sulej District on 27th November, 1850. Finally the matter came on appeal before Sir Henry Lawrence first member of the Board of Administration. (Part A page 49). The appeal was dismissed—the order dealing *seriatim* with the grounds of appeal—one of the grounds (2) urged was that as the *Rais* had by the Notification of 1849 been deprived of civil executive powers the State of Kunjpura was no longer like those States the partition of which is impossible, but Sir Henry Lawrence's decision, which is badly translated and is not too lucid in original, was to the effect that the reduction of the Civil and Criminal powers did not render the state liable to partition. Two other cases which do not appear in the printed paper book require notice.

In 1882 one son of Muhammad Yar Khan claimed further maintenance from the then Nawab and the matter was referred to the Local Government. The then Lieutenant-Governor, Sir Charles Aitchison, pointed out that it was not a matter which could be settled by executive authority, and that he could only dispose of it finally if asked to act as arbitrator between the parties which he was willing to do. He was appointed arbitrator and in his award clearly accepted the principle that all that the younger members of the family could claim from the Nawab was reasonable maintenance. The award was given in 1884.

In December, 1870, the sons of Muhammad Sher Ali Khan, one of the sons of Nawab Gul Sher Khan, half brother of Rahmat Khan Nawab, brought a suit against Nawab Muhammad Ali Khan, the Jagirdar of Kunjpura, for a continuance of the allowance made to their father for maintenance. It will be remembered that it was decided in 1822 that the whole of the maintenance allotted to the three younger half brothers of Nawab Rahmat Khan was to be paid by the Nawab alone and no part of it by Ghulam Mohy-ud-Din Khan. It was held.

that the suit in which the plaintiffs alleged that the grant for maintenance was in perpetuity was triable by Civil Court and this Court finally decided, that the grant for maintenance was for life only, they being "only life grants resumable after the death of the grantee by the reigning Nawab", throughout the case it never seems to have been ever suggested that they were entitled to share in the inheritance according to Muhammadan Law, the claim of the plaintiffs was that they were entitled to succeed to the maintenance granted to their father, which they alleged was a grant in perpetuity. This claim was dismissed, the whole question of the custom of the family on that point being fully discussed. It is curious that this case was not brought forward in the lower Courts and is not mentioned in its judgment.

This completes the history of definite claims made in the assertions of personal rights to share in some form or another in the Kunjpura estate.

* In a letter from the Financial Commissioner to the Commissioner of Delhi, dated 26th April, 1887, it is stated that Mr. Barnes, as Commissioner of the Cis Sutlej Division, in para. 16 of his letter No. 853 of 10th May 1854, ruled that there was no reason for debarring the Chief after the decease of Muhammad Yar Khan from again bringing his claim to resume the assignments under the consideration of the authorities of the day, and he then proceeds to say "on a careful consideration of the whole circumstances of the case as disclosed in the correspondence referred to, the Financial Commissioner has no hesitation in holding that, Muhammad Yar Khan having died, the assignments made by him should revert to the estate of the minor Nawab Ibrahim Ali Khan.

"The village of Biana and the land in Kunjpura held by the deceased have always been held to form part of the estate of the Chief of Kunjpura and the mere fact that the former *quasi* independent Chief of Kunjpura has been reduced to the position of a Jagirdar is not in itself sufficient reason for the resumption by Government of any portion of the lands, which are admitted to have formed part of his original possessions."

We now come to another piece of evidence of some value.

The Kunjpura State held property in the Saharanpur District. We find on the death of Bahadar Jang Khan in 1830 that Ghulam Ali Nawab made a report to the effect that Bahadar Jang Khan was dead and he had come into the possession of the State because it was hereditary and ancestral, and all other property of which he was possessed. (Paper

book C. page 2). Upon this the *Kanungo* made a report and an order to the following effect was passed in the Settlement Record on 9th May, 1832.

The enquiry and the statement of the *Kanungo* of Mahal and a perusal of some of the papers relating to the previous settlements and received from the office show that the *zamindari* right of the village in question belonged to Rahmat Khan of Kunjpura. After the death of Rahmat Khan, his eldest son Bahadar Jang Khan and after the death of Bahadar Jang Khan his real brother, Ghulam Ali Khan, came in possession thereof. Although the said Ghulam Ali Khan has two rightful real brothers, namely, Shahbaz Khan and Janbaz Khan, but, according to the custom of his family Ghulam Ali Khan, *Masnad nashin* of the Kunjpura State, holds possession of the *Zamindari* rights of the villages in question.

An extract from the Record of Rights of *Mauza* Rasulpur Pargana Sarsawa for the year 1230 *falsi*—1822 gives an account of the village and of the rights of the *biswadaris*. This is a valuable piece of evidence (Paper Book C., page 4). It clearly recites that whoever sits on the *masnad* becomes proprietor of the ancestral estate and responsible to meet the expenses of his brothers and relatives to the extent of their capabilities and relation to the Nawab, but there was no custom of partition, hence the entries were made in favour of one alone, and according to the custom of the family of the said Nawab the shares of the remaining co-sharers have not been set forth.

A somewhat similar note is given in an order by Mr. Franco, Collector of the Muzaffarnagar District, on 3rd April 1833 (C. page 5), in which the custom of the family is again set forth and entries ordered to be made in accordance with it.

In 1849, as noted above, the state was deprived of Civil and Criminal Jurisdiction and the Nawab reduced to the position of a private citizen. Notice of this was sent to Muhammad Yar Khan through the Nawab. The fact that notice was sent was urged by the appellant as showing independance but it was sent through the Nawab which negatives the idea.

Shortly after 1849 Settlement operations began and several of the orders quoted above were passed during the progress of Settlement proceedings.

We find at Settlement that there were various disputes, but as regards the villages then in the Nawab's possession he was entered as owner. In the *Wajib-ul-arz* of 30th October, 1853, the following entry occurs in respect of the following villages—Mohyuddinpur, Chhapra Rasulpur, Sharafabad (paper Book D pages 4 and 5). "In this village the *Limbardar*, *Jagirdar* and *Zamindar* is one and the same person and he has not the right of alienating the *Jagir* and *Zamindar* estate for the reason that the *Zamindari* estate belongs to the State." Curiously enough the entry made as to *Mauzi* Kunjpura itself is not identical with these. It is dated 1856 and does not contain the proviso against alienation though it recites that Nawab is sole *Zamindari*, *Biswadar* and *Jagirdar*. In the Saharanpur villages of Mustatapur, Khizarpur and Rasulpur, Tahsil Faizabad, Saharanpur (District), the entry is "the village is held on *Zamindari* tenure and relates to the Kunjpura State. Only I, Muhammad Ali Khan, *Masnad Nashin*, am in possession of it. No co-sharer can have it partitioned." This is dated 30th September, 1859.

When Muhamad Ali Khan succeeded in the end of 1849 after the issue of the proclamation taking away the last remnant of sovereign rights, he was acknowledged as titular Nawab and was invested with a robe of State. (See letter No. 2454, dated 22nd November, 1849 from Sir Henry Elliot, Secretary to Government of India to Board of Administration). The *Jagir* it is admitted was continued entirely in the name of the new Nawab and the entries in the Settlement of 1889 was also in his favour. Except that as regards the *Wajib-ul-arz* (village administration paper) the entry in 1889 is to the effect that no entry on this point is necessary.

The Kunjpura *Jagir* has been brought under the special Act passed in amendment of the Punjab Laws Act of 1872 in 1900 and known as the Punjab Descent of *Jagirs* Act.

The oral evidence, which commences at page 39 paper book B., is really of very little value, but we have perused it all.

It appears to us upon a review of the evidence upon the record that the custom set up by the defendant having obtained in the family up to 1849 is proved beyond all doubt to have been the rule of succession. No doubt up to 1806 when the State came under British protection times had been very troublous, but this only renders the probability that the eldest son, or as is stated in the settlement record of one of the Saharanpur villages in 1833, the ablest (*laik*) son would succeed to

the *Masnad*, and then whoever became *Masnad Nashin* succeeded to the whole property of the state subject to the duty of providing suitable maintenance for the younger members of the family. This maintenance seems to have varied in extent, but there is a good deal on the record to indicate that it was understood that the basis of calculation should be five wells. We have no hesitation in finding that the custom of the Kunjpura family up to 1849 was for the ablest son to succeed to the *Masnad Nashin* and that whoever succeeded to the *Masnad* took the whole estate and provided maintenance for the younger sons. The "ablest" by the ordinary process of evolution when times became settled became the "eldest." The same thing occurred after the proclamation in 1849, but Nawab Muhammad Ali Khan who then succeeded was an only son. He, however, proceeded at once right and left to assert successfully his rights to resume and revise maintenance grants on the death of the grantees, and, as we have seen, he succeeded in his contention, that the grants were resumable, in the Chief Court in the case of *Ali Ahmad Khan and others versus Muhammad Ali Khan*, Nawab of Kunjpura, decided by this Court finally on review on 11th January, 1873. The case now before us it is urged, is the first case which has occurred since the proclamation of 1849 in which a Nawab has died leaving more than one son, and it is urged, the resumption of the "Sovereign rights" and the reduction of the Nawab to the position of a private gentleman completely altered the whole aspect of the case, and destroyed the binding force of the custom if it had ever existed.

There does not appear to us to be sufficient reason to hold that the family custom, which we hold to have been established before 1849, was abrogated by the proclamation so far as concerns the property which was then the property of the State. We know that this could not have been in accordance with the policy of the supreme Government, and we know that in 1849 when Nawab Ghulam Ali Khan died after the issue of proclamation his son was allowed to succeed to the title of Nawab and was invested with a robe of state (letter 219, dated 4th February 1850, from Punjab Board of Administration, to Superintendent Cis Sutlej States).

The Supreme Government undoubtedly took away certain powers and privileges; it had done some thing in this direction in 1837 on which occasion it took away the right of the Nawab to levy dues and it at once upon that occasion allotted compensation for the resumption,

which is still paid. We are not to assume any intention on the part of the paramount power to interfere further than was necessary for the carrying out of these purposes which was to provide for the good government of the state and there is not only no indications that there was any interference with family custom but every indications to the contrary. We find in the case of *Muhammad Afzal Khan versus Ghulam Qasim Khan*, (*I. L. R.*, XXX Cal., page 843 P. C.) that these principles received full assent from their Lordships of the Privy Council—in that case the vicissitudes undergone by the Nawab of Tank had been even greater than in the case of the Kunjpura family and the lands there in dispute had been actually for years out of the possession of the Nawab's family and had been regranted by Government. The case for the existence of a precisely similar custom set up by the Nawab of Tank was not nearly so strong as it is in regard to the Kunjpura family.

We think, therefore, that the custom set up by the defendant Nawab is made out as regards all property which can be shown to have formed part of the state before 1849. But as regards lands subsequently acquired we think the case is different. The custom owed its rise and *raison d'être* to the existence of the state and the exigencies of Chiefship. A family custom, respected by the authorities and fully established as accompanying the Chiefship must be held to obtain as regards the estates of the Chiefship as such. But when the Chiefship ceased as an independent entity, it was not only privileges but duties and liabilities also which were abrogated, and we do not think that lands and property acquired by the Nawab after 1849 with income which he was admittedly competent to deal with as he pleased, can be held to be subject to the same rule of succession now, as the land which once appertained to the Chief as Chief, and here also we can obtain valuable guidance from the case of *Muhammad Afzal Khan versus Ghulam Qasim Khan* (*I. L. R.*, XXX Cal., page 843), noted above and known as the Tank case, decided by a Division Bench of this Court on 3rd January, 1898 and by their Lordships of the Privy Council on 15th May, 1903.

It appears from the judgment of this Court at page 844 of *I. L. R.*, XXX Cal., that there was a large amount of property in general of over 32,000 *kanals*-4000 *acres* which the Nawab did not even claim to be subject to the special custom of primogeniture set up, although it had been acquired by the Nawabs, and there was also certain other property of small area which was claimed but to which the rule of primogeniture

was held not to apply. We would apply the same principle here, and we shall uphold the decision of the lower Court and dismiss the claim as regards all the lands which were owned by the State, as a State, before 1849 and which we hold includes all the lands then in the Nawab's possession and so entered in the Settlement Records of 1852, and we shall decree their share to the plaintiffs of the remaining lands holding that as regards those the personal law of the parties, that is, the Muhammadan Law must apply, as it is clear that no other custom has been shown to govern succession in the family.

As regards the exact details of the property land and otherwise to be decreed we will decide after hearing counsel further.

APPELLATE SIDE.

No. 155.

CRIMINAL.

Before Mr. Justice Chevis.

KAKA SINGH, —(CONVICT,)—APPELLANT,

versus

THE KING-EMPEROR,—RESPONDENT.

CASE No. 61 OF 1908.

Evidence Act (I of 1872), Section 27—Confession—Accused pointing out stolen property concealed in a pond.

The accused pointed out the place in the pond where the bundle of stolen ornaments was recovered. The prosecution alleged that the accused had said to the police that he had buried the things in the pond.

Held, that the statement of the accused was inadmissible in evidence.

Appeal from the order of Lala Damodar Das, Magistrate, 1st Class, exercising enhanced powers under Section 30, Criminal Procedure Code, at Amballa, dated the 23rd December 1907, convicting the appellant.

Mr. Roshan Lal, Advocate, for Appellant.

The Government Advocate, for Respondent.

JUDGMENT.

CHEVIS, J. (11th May 1908).—The appellant, Kaka Singh, has been convicted under Section 414. A burglary had been committed in the house of Umrao Singh, and appellant is said to have received some of the stolen property from Mussammat Gangi, wife of Nandu, Sunar, and to have concealed it in a pond, whence it was subsequently discovered

at his instance. That he pointed out the place in the pond where the bundle of ornaments was recovered, I quite believe. Whether Nandu was also present is doubtful, see evidence of Munshi Ram.

The Sub-Judge says appellant said he had buried the things in the pond, but this evidence seems inadmissible. Other witnesses say Kaka Singh named Nandu as the person who had put the ornaments in the pond.

I note that Nandu also was at first *challaned* in this case and convicted under section 411, but acquitted on appeal by the Sessions Judge.

Apart from the above evidence there is only the evidence of *Mussammat* Gangi and a *dhobi*. The latter says he saw appellant take a bundle from Gangi, but the Magistrate has refused—and I think rightly—to regard this evidence as reliable. *Mussammat* Gangi denies having ever had the things, and only admits before the Magistrate that appellant came to her and spoke of *Mussammat* Misri having put some things in a tub and that she pointed out Misri's tub to the appellant, who took a bundle out of it. *Mussammat* Gangi, as well as her husband, have been suspected in connection with this burglary and her statement is surely not reliable.

Kaka Singh is an old thief, and has been employed by the police to enquire into cases

He enquired into this very case, it seems, and so may well have got to know where some of the property was buried. But I consider there is no sufficient proof that he himself had any hand in the concealment. I would refer to *P. R.*, 20 of 1905⁽¹⁾ and *I. L. R.*, *XVII All.*, 576.

I accept the appeal, and, reversing the finding and sentence, I acquit the appellant and order him to be released.

Appeal allowed.

FULL BENCH.

APPELLATE SIDE.

No. 156.

CIVIL.

Before Sir William Clark, Kt., Chief Judge, Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

SADHU SINGH,—(PLAINTIFF)—APPELLANT,

versus

SECRETARY OF STATE FOR INDIA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.—

(1) S. C. 77 *P. L. R.*, 1905.

CASE No. 32 of 1907.

Custom—Succession—Ancestral property. Forfeiture of, by Government on owner absconding—Reversioner. Right of—Criminal Procedure Code (Act V of 1898), Sections 87, 88.

Held, by Clark, C. J., and Chatterji, J., Johnstone, J. *dissentiente*, that when ancestral land belonging to a person subject to customary law is forfeited to Government it does not extinguish the rights of his heirs and reversioners to recover the land on his death from any person who may be in possession of it at the instance of Government by sale or otherwise.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Ambala Division, dated 18th October 1906.

Lala Dwarka Das, Pleader, for Appellant.

Mr. Turner, Advocate, for Respondent.

ORDER OF REFERENCE.

JOHNSTONE, J.—(26th April 1907).—Plaintiff's father, accused, in 1898 of the attempt to murder a child, absconded. Proceedings were taken against him under Sections 87 and 88 of the Criminal Procedure Code and his property—a house and 19 *bighas*, 12 *biswas* of agricultural land, ancestral estate—was sold by auction. Plaintiff sues for a declaration that the sale shall not affect his reversionary rights as heir after his father and he impleads the Secretary of State for India, the purchaser of the land and the sons of the purchaser of the house.

The first Court found the estate ancestral and went on to hold that inasmuch as the act of plaintiff's father in absconding was voluntary and not necessary, the sale should be treated as one not for "necessity" and so as not affecting plaintiff's rights. It therefore gave plaintiff the declaration asked for subject to the condition as regards the house, that he must repay to the sons of the purchaser of it such sums as they may spend or have spent in rebuilding it.

Government and the private defendants appealed separately to the Divisional Court, and plaintiff filed cross-objections, regarding a small sum of costs. The learned Divisional Judge accepted the appeals and dismissed the cross-objections whereupon plaintiff appealed to this Court.

We have heard arguments and find in consideration of the importance of the main question raised and of its difficulty that it is desirable to have a Full Bench decision upon it.

The question for decision may be stated thus—

When ancestral immoveable property held by a man subject to

Punjab Customary Law is attached and sold by order of a Criminal Court under Section 88, Criminal Procedure Code, does the sale dispose of the life-interest of that man only, or is the effect of the sale this that the right of inheritance after his death of his male lineal descendants or of collaterals, descended from the original holder of the property, is extinguished?

As at present advised I lean towards the latter alternative. I will not discuss the matter at length here, but merely indicate the general lines upon which, in my opinion, a correct decision may be arrived at. *Lala Dwarka Das* refers us to Hindu Law of the *Mitakshara* School, but, it seems to me, that there is a vital distinction between that law and Punjab custom. A member of a joint Hindu family becomes at birth a co-partner in the property and can at any time even demand partition while the son of a living male proprietor, who is a Punjab agriculturist, is certainly not a co-partner and cannot demand partition of the estate held by his father.

Again I have studied the passages in the rulings reported at page 247, paragraph 2 in *Gujur v. Sham Das* 107 P. R., 1887, F. B. page 62, in *Sita Ram v. Raja Ram* 12 P. R., 1892 F. B. page 9, last paragraph of *Badhawa v. Sher Muhammad* 2 P. R., 1895, and other to which *Lala Dwarka Das* has referred us as well as the remarks at page 60, Rattigan's Digest, 6th Edition. Upon these observations *Lala Dwarka Das* bases his contention that plaintiff has a part of the ownership in the estate already, even during the lifetime of his father. Certain phrases used in rulings by the chief supporters of the Punjab "agnatic theory" do lend colour to this contention, but when I examine the matter carefully, I have great difficulty in conceding that plaintiff has any such interest in the estate as can survive attachment and sale by operation of law under order of a Magistrate. It may be that a male proprietor in the Punjab holding ancestral estate has not got what jurists would call an absolute ownership, but at present I am unable to see that his son who has a right during his father's lifetime to obtain only declaration against his father's alienation without "necessity" and who also has a mere contingent right to succeed his father upon the latter's death but who has during his father's life no right to dispose of or enjoy the profits of the estate in any shape or form or in the smallest degree, has such a part in the ownership as can exist apart from his father's ownership. To use the English phrase I cannot

see that the son has any "estate" in the property while his father is alive, and I am inclined to hold that upon the sale under Section 88, Criminal Procedure Code, the fee simple of the property was sold and nothing remained for plaintiff to inherit. Call plaintiff's father's rights absolute ownership or something less than absolute ownership, it seems to me at present that, when under Section 88 property "belonging" to plaintiff's father was sold by auction the correct view is that the purchasers became full and absolute owners.

The attempt of the first Court to assimilate this case of involuntary transfer to case of voluntary transfer by a male proprietor seems to me sophistical and unsound.

I wish also to draw especial attention to the phrases used in *Kota v. Harnam* 18 P. R., 1895, F. B. page 71 and page 77, and in *Ilahiya v. Ganda Singh* 116 P. R., 1890 F. B. page 369, paragraph 4, in regard to the nature of the estate of a male agriculturist in the Punjab, *e. g.*, "has the entire estate for the time being"; "full owner"; and so forth. *Turab v. Crown* 23 P. R., 1900⁽¹⁾ Cr., quoted by *Lala Dwarka Das* seems rather against plaintiff than in his favour, the Court assuming that it had power to confiscate absolutely.

CHATTERJI, J.—(28th April, 1907.)—I concur in the foregoing order of reference of the question stated to a Full Bench reserving my own opinion for the present.

JUDGMENT OF THE FULL BENCH.

JOHNSTONE, J.—(23rd July, 1907.)—We have now heard full arguments. My own view remains much as before, and I do not wish to repeat at length what I wrote in my referring order.

It is enough if I set down briefly that there seems to me for the reason given by me, a vital difference between cases under the *Mitakshara* Law and cases under Punjab custom, and if I then proceed to state, with reference to the Punjab authorities, what seems to me the true positions of a male holder of ancestral land in this province and of the next heir.

The rulings I wish to quote from are *Gujar v. Sham Das*, 107 P. R., 1887, *Sita Ram v. Raja Ram* 12 P. R., 1892, *Badhawa v. Sher Muhammad* 2 P. R., 1895, *Jowahir v. Mussamat Chandi* 90 P. R., 1892, *Roda v. Harnam* 18 P. R., 1895, F. B., *Ilahiya v. Ganda Singh* 116 P. R., 1890, F. B., *Devi Ditta v. Saudagar Singh* 65 P. R., 1900⁽²⁾, F. B. I put

(1) S. C. P. L. R., 1900, p. 35 (Cr.)

(2) S. C. P. L. R., 1900, p. 323.

them in this order because the first three of them are relied upon by the appellants, whereas in my opinion for our present purpose the remainder give better and clearer ideas. There are also useful observations in the following authorities, but I do not propose to unduly lengthen this judgment by specific discussion of them, *viz.*, *Mussummat Shah Khanam v. Kalandhar Khan* 74 P. R., 1900⁽¹⁾, *Ram Rakhmal v. Balwant Singh* 58 P. R., 1905⁽²⁾, *Muhammad Khan v. Sis Bano* 41 P. R., 1906⁽³⁾, *Sartaj Kuari v. Deoraj Kuari*, I. L. R., X All. 272 (at page 287). In *Gujar v. Sham Das* 107 P. R., 1887, F. B. at page 247, are these words "The prevailing sentiment in this province among agriculturists....." "is that in respect of ancestral immoveable property in the hands of any individual there exists some sort of residuary interest in all the descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever having the enjoyment of the property. The owner in possession is not regarded as having the whole and sole interest in the property and power to dispose of it, so as to defeat the expectations of those who are deemed to have a residuary interest and who would take the property if the owner died without disposing of it."

In my opinion the phrase twice used in this passage "residuary interest" is inaccurate and misleading. A merely contingent interest cannot be a *residuary* interest. Instances of residuary and contingent interests will make this quite clear. A testator bequeaths his house and £1,000 to A, and the rest of his estate to B. B. is residuary legatee, *i. e.*, he gets immediately on death of testator, the latter's estate minus the house and £1,000. There may be no residue for him to take, but his interest is not contingent—he takes whatever is available after A gets the house and the £1,000. It would be quite different if the estate was left as a whole to A. with the addition that, if B. should survive A. B. would take after A. This would not be for B. a residuary but a contingent interest.

But even if the interest of a Punjab agriculturist's son in the ancestral land be called a residuary interest, it does not follow that there will be any residuum for him to take. If, for instance, the father permanently alienates the whole for "necessity," where is the residuum for the son? Equally if the father comes into collision with the

(1) s. c. P. L. R., 1900, p. 455.

(3) s. c. 95 P. L. R., 1906.

(2) s. c. 59 P. L. R., 1905.

Criminal Law and the Magistrate confiscates his land, in my opinion no residuum remains for the son, or, as I would prefer to put it, the son's contingent reversionary claim is wholly defeated.

In *Sita Ram v. Raja Ram* 12 P. R., 1892 F.B. at page 62, it is stated "that the last holder of the estate was not an absolute owner, that he held it "subject to the reversionary rights of the community," and so forth. This was, of course, also a case of property subject to Punjab agricultural custom. This may be a convenient way of putting the matter; but in my opinion the holder for the time being is full owner, though a salutary rule of custom enables his heirs to step in to prevent waste.

In *Badhawa v. Sher Muhammad* 2 P. R. 1895 (page 9), it is said that "the great principle is.....that in compact agricultural communities in "the Punjab.....ancestral land is regarded as not at the absolute disposal "of the male holder in possession. Persons descended from the common "ancestors.....have an inchoate interest in it which he cannot "defeat except for necessity."

And in *Ralla v. Budha* 50 P.R. 1893 F.B. we find the following:—"It "is a common feature of customary law throughout the province that no "individual whether or not he has male issue, is under ordinary circum- "stances competent by his own sole act to prevent the devolution of ances- "tral land in accordance with the rules of inheritance.....The exercise "of any power which would affect the operation of these rules to the "detriment of the natural successors, is liable to be controlled by them "whether the act done be a partition or a gift, or a sale or mortgage, "otherwise than for necessity." The dictum in this ruling I thoroughly approve: the holder may be restrained by the heirs from making voluntary alienations, otherwise than for necessity.

Let us now see some rulings in which, while the right of control resting in the heirs is adequately recognized, the relative positions of the holder and of his heirs *qua* ownerships are described in what with all respect I conceive to be the correct way. At page 311 in *Jowahir v. Mus-sammatt Chandi* 90 P. R. 1892, there is quoted *in extenso* a note by Sir Meredyth Plowden, the Judge to whose insight and ingenuity we owe to a large extent our Punjab "agnatic theory" and its connotations. It runs thus—"It has been repeatedly pointed out that a childless proprietor "and a widow are not on the same footing. *A man without son is as much "a proprietor as a man with sons. A widow, as such, is not a proprietor. "She has a life interest with a power, under certain circumstances, of*

"disposition. The childless proprietor is not, like a widow, under any obligation to preserve the property for his successors.....Now in this province, the father has a power of disposition over ancestral property which he can exercise without the consent of his sons, and without their joining in the conveyance. The whole interest in the land is in the father or childless proprietor, thus distinguishing them from the widow. The heirs may possibly intervene to prevent a wanton alienation, etc., etc.," I wish to express hearty concurrence in all this, and especially in the sentences italicised. The dicta regarding widows I will use again later to meet a suggested difficulty in my way.

Later in *Roda v. Harnam* 18 P. R., 1895 F.B., the same learned Judge said, speaking for himself and Roe, J.—

"We take it that by custom (speaking generally) a sonless man who holds ancestral land has the entire interest therein for the time being... In short, generally speaking, the true description under the customary law of male holder of ancestral land is that he is full owner, with an interest transmissible, etc., etc., but has a limited power of alienation, liable to be controlled by the heirs."

Here I take it that "transmissible" cannot mean "which must be transmitted" but "which in the ordinary course, if the land at death of the holder is still his, will devolve upon his heirs." As a matter of fact, if alienation was made for necessity, or if the holder fell into debt and the land was sold under execution of decree under the old law, or if in any other way the land ceased to be his before his death, there would be no transmission to heirs. The Full Bench, page 77, fully accepted the above-quoted passage as sound.

Next, in *Ilahiya v. Ganda Singh* 116 P. R., 1890 F.B. Plowden, J., remarked—"We adopted the view that a childless proprietor is full owner of ancestral property in his possession, notwithstanding that his power of disposition is not absolute, and that an alienation in excess of his powers is voidable *pro tanto* by his heirs."

Further, in *Devi Ditta v. Saudagar Singh* 65 P. R. 1900⁽¹⁾ page 296, the position of a male owner of ancestral land is thus described "Although the male proprietor has not an unrestricted power of alienation of ancestral land, where he has male descendants or collaterals, he is, unlike the widow, a full proprietor."

(1) S. C. P. L. R., 1900, p. 322.

I could go on quoting similar *dicta* all up and down the Punjab Record, but I think the above references are at present sufficient.

The question for me now is—When the Magistrate attached and sold under the Criminal Procedure the property “belonging” to Thakria, what was that property? The Magistrate intended to sell the fee-simple of the land: did it belong to Thakria? We have seen that Thakria was “full-owner,” “full proprietor,” “the whole interest in the land” rested in him, and he was “under no obligation to preserve the property for his successors.” The property was not at his absolute disposal, for the heirs can by a peculiar customary rule step in to prevent waste, and, apart from “necessity,” he was not competent “by his own sole act” to interfere with the devolution of the estate, the acts contemplated being “partition, gift, sale or mortgage” or similar voluntary acts. I can see in all this no warrant for the idea that when Government attached and sold what belonged to Thakria, anything whatever belonging to his heir remained in existence. We have seen that the heir had no residuary interest, property so-called but merely a contingent interest had been defeated.

Another way of looking at it is this. Undoubtedly it does sometimes happen that part of the incidents of ownership of land reside in one person and part in another person. A. may be superior and B. inferior proprietor, A. may be proprietor and B. may be mortgagee. A. may be proprietor and B. may have a permanent right to use the water of a well on the land or to fell a certain amount of timber on the land every year; and so forth. Here A.’s property may be sold by him, or may be confiscated by process of law, and yet B.’s interest will remain intact. Under no circumstances can A. deprive B. of his rights, and under no circumstances could B.’s rights be legally confiscated on account of acts of A.’s. B.’s rights are a solid, substantial, immediately existing thing; and the consequences of this state of affairs are easy to understand. But how different is the case of a Punjab landowner and his heir! In certain circumstances the former can dispose of the land generally and completely without the consent of the heir and even against his expressly declared wishes, and without the heir joining in the conveyance—see *Jowahir v. Mussamat Chandi* 90 P. R. 1892, as quoted above. How can it be said in reason that part of the ownership rests in a man who, except in certain circumstances, has no voice in the disposal of the land? Ownership is ownership. If the heir is, in any sense or in the most limited degree, an owner

along with his Punjabi father, in no *possible circumstances* could the latter dispose of his own and his heir's interests without the concurrence of the latter and even against his wishes. In short the real state of affairs is this. The father is full owner ; but in the interests of heirs a customary rule has been involved to the effect that alienations not for " necessity" can be ignored by them. This does not imply that in the heirs there rests any part of the ownership. Apart from the peculiar case of alienation without " necessity," if the father's rights in the land are wholly parted with, or come to an end by operation of law, criminal or civil, nothing remains. (Until recently land could be sold in execution of decree.)

It has been suggested that, if such arguments as these are accepted, they would apply equally to the case of a widow, and that then we should have the spectacle of a widow charged with a crime and absconding, and of the resulting confiscation of her late husband's land operating to defeat the claims of revisioners. But this suggestion is wholly inadmissible. Earlier in this judgment I have drawn attention to the views taken by this Court of the vast difference between a Punjab male holder of land and a widow, and not much reflection is required to make it clear that a Punjabi widow, whose rights are the outcome of, and a growth from her, right of maintenance, is not a full owner and perhaps not an owner at all, though she can alienate for " necessity." I do not think I need pursue this matter further.

Having then arrived at this that Thakria was full owner and that the Magistrate confiscated the full ownership, I ask next is there any law or rule under which the heir can ask a Court to set aside the confiscation in so far as it affects him ? If Thakria had himself alienated not for " necessity," the heir could have done this is the result of well ascertained custom, and his suit here would have a solid foundation. But what foundation is there for a suit like the present one? There is no statute law to help the heir, and it is not pretended that there is any proved custom under which an heir can sue Government and ask to have it declared that a confiscation strictly in accordance with the criminal law of the country should be set aside in whole or in part. To agree that, Thakria's absconding being a voluntary act, the confiscation amounts to a voluntary alienation by him, seems to me a mere sophism : it involves the fallacy which logicians call an amphiboly. Voluntary alienation implies a wish to alienate. Flight, the consequences of which in regard to the property may very likely not be known to the fugitive, cannot possibly

be called a voluntary alienation. And even if Thakria knew that confiscation would follow his flight, he certainly did not *wish* to alienate the land. At the worst he abandoned his rights in such a way that the land fell to be disposed of by law by Government for its sole benefit. I am unable to see how the well-ascertained custom aforesaid can be stretched, in the absence of instances, so as to cover such a case.

I would like to see the law in Section 88, Criminal Procedure Code, amended so as to protect the reversioners of a Punjabi agriculturist. In my opinion at present the law does not protect them ; but, though this is hard upon them, I do not think the proper remedy is to strain the law and misinterpret it but to amend it. To rule now, simply in order to meet the present difficulty, that the Punjabi father is *not* full owner of his land, but that he shares the ownership with his heirs, may save reversioners from hardship, but this course will nullify much of the reasoning in Chief Court rulings and will lead to much confusion in litigation among agriculturists. It will supersede legal pronouncements which have become the very basis of all our ideas about the nature of land tenure in the Province, and it is hard to say how much uncertainty and doubt will not be created extending over the whole realm of customary law in connection with landed property here.

For these reasons I would adopt the second alternative stated in my referring order as the question for consideration.

CLARK, C. J.—(26th July, 1907).—The decision of the point referred depends entirely on what is meant under Punjab Customary Law by the ownership of the owner actually in possession of ancestral land. My learned brother Johnstone has made a very interesting and instructive collection of decisions and quotations from judgment of this Court showing the respective interests in the estate of the owner in possession, his reversioner and the widow.

The owner in possession is undoubtedly often described a "full owner," but such descriptions must be taken with reference to the facts of the case in which his title is discussed.

To account for his power to alienate his land for necessity, without consulting his reversioners, it was necessary to hold him a full owner from that point of view.

In my opinion we must consider his ownership from an independent point of view with reference to the facts of the case before us, it does

not follow that because he was held to be a "full owner" to explain certain of his powers, he must therefore be held to be a full owner for all purposes.

It is established that the owner in possession can only alienate ancestral land for necessity, and other alienations of his are not binding on his heirs. This implies to my mind some interest in the estate on the part of the reversioners, whether it be called 'residuary' or 'inchoate, or 'vested' or 'contingent,' it is some definite interest. This interest cannot be infringed, by waste or extravagance on the part of the owner, then why should it be infringed by crime or absconding on his part?

The ultimate reason that it can be infringed upon for necessity, may perhaps be for the benefit of the reversioners. This power allows to protect his whole estate, by the sacrifice of a portion. Probably also his lien on the estate for his own subsistence and for Government Revenue is recognized in giving him this power.

This exceedingly limited power of alienation for necessity, often for the benefit of the estate, seems to me to suggest the general rule that the reversioners have a property of some kind in the estate, subject to the life property of the owner in possession, and with an exception, that the owner in possession can treat the property as if it was his alone, in case of necessity.

In Sweet's Law Dictionary under the head Reversionary Interest it is stated "Any right in property, the enjoyment of which is deferred, is a reversionary right in the wide sense "of the term."

The right of the reversioner under Customary Law seems to me to amount to a right in property, the enjoyment of which is deferred. It is vested in interest according to the meaning of the term under the heading "estate" in that Dictionary.

An estate is vested in the interest, when the tenant has a present fixed right to the future enjoyment. The present possessor can certainly not be absolute owner, such ownership implies the power of disposal at pleasure, the *jusutendi, fruendi, et abutendi*. He not being absolute owner, with whom rests the ownership not resting with him?

Ownership may be present, as in the case of estate in possession, or deferred as in the case of an estate in reversion, see paragraph 9 of the heading estate in that Dictionary.

Under the heading estate in the Encyclopædia of the Laws of England, the estate of the reversioners under Punjab Customary Law may be regarded as an estate in expectancy.

However, the reversioner under English Laws is very different from the reversioner under Punjab Customary Law and the rights of the latter have to be considered on their own merits, and it is only in a general way that the terms and definition of the English Law can be used to determine his rights. From a quotation from Mayne's Criminal Law of India, which I will presently make, it will appear that the attainder of an ancestor did not prevent the descent of an estate entailed upon issue, because they claimed not from him, but by virtue of the previous gift to themselves as his children.

In this respect the reversioner of the Customary Law bears a resemblance to the tenant in fact. Such reversioners not inheriting from the last owner but from the common ancestor.

The conclusion I arrive at is that the reversioner has such definite interest in the ancestral property, that the owner in possession cannot by his crime or absconding cause that interest to be forfeited, and only his life interest can be forfeited.

There has been no attempt in this case to fall back upon Hindu Law, because custom in the matter has not been established. It has rightly been recognized that the rights of the reversioner being based on Customary Law, his rights in this particular instance must be governed by custom and the custom must be deduced by analogies and inferences based on known facts of the Customary Law.

According to *Mitakshara*, however, apparently the forfeiture of the father's estate would not involve the son's estate. In this connection, I quote an interesting passage from Mayne's Criminal Law of India under Section 61 of the Indian Penal Code.

"And, therefore, according to English Law, the attainder of "an elder son would intercept the rights of a younger son, and, "all other collateral relations, who could only take after him. If, therefore,

"he could not take for himself, and they could not take in consequence of his blocking up the way, the estate necessarily escheated. (1 Steph. Com 420). But it may well be questioned whether this would be the case with Hindus under *Mitakshara* Law, when the sons take not after, but along with, the father as his co-heirs. It is to be observed too, that forfeiture under the Code has not the effect of corrupting the blood and extinguishing its power of transmitting inheritable rights. The moment the sentence has expired, the strain of inheritance flows on unimpeded. It is only the personal rights of the convict which are transferred to Government by a sort of statutory conveyance, *but I conceive that Government takes nothing which he could not have assigned away.* And so it was by English Law, that the attainder of the ancestor did not prevent the descent of an estate entailed upon his issue, because they claimed not from him, but by virtue of the previous gift to themselves as his children." (Williams R. P. 49).

The question is undoubtedly one of great difficulty, in coming to the conclusion I have formed, I have been influenced by the consideration that in the matter of a highly penal provision of the nature of the one under discussion the benefit of any doubt should be given to the subject and not to the Crown.

I am not impressed by the distinction drawn between alienation for necessity being a voluntary act, and an alienation by forfeiture not being voluntary, but by operation of law, because the distinction seems to me to be irrelevant, if the reversioner has the interest in the property which according to my views he in fact possesses.

CHATTERJI, J.—(28th July 1907.)—I agree with the learned Chief Judge that a *Jat* agriculturist in the Punjab governed by Customary Law having sons or collaterals is not a full owner, in the strict sense of the term, of ancestral land in his hands. It is not disputed in this case that the plaintiff and his father are governed by Customary Law or that plaintiff's father had not an unrestricted power of alienation, that is, a power of alienation without necessity.

A case of this description has not arisen before and is not to be found referred to in the records of Customary Law. It does not follow, however, that it is not capable of being decided on principles of that

law by applying them to the present set of facts. Law always lags behind the progress of society and if we were to insist that for every fresh complication of facts that requires decision some positive rule directly applicable must be found, Courts of Justice would be paralysed in exercising their functions in many instances and the greatest inconvenience would be caused. Principles underlying the existing law must be extended by analogy and other approved methods to new phases of affairs. This equally applies in the case of Customary Law. See *Daya Ram v. Soheli Singh* 110 P. R., 1906 (1) F. B., *Jowala v. Hira Singh* 55 P. R., 1903 (2) F. B. and *Mirehouse v. Rennell* 8 Bing 492.

I am therefore not pressed with the difficulty which my brother Johnstone seems to feel in giving a tangible shape to the customary right of the plaintiff to restrain alienations by his father without necessity and to allow it to have effect in a novel situation like the present. The right I think has distinct bearing on the situation and is itself a tangible right of which the law can and should take cognizance. It is not a sufficient reason for ignoring its existence or for not giving effect to it that phraseology borrowed from English Law cannot adequately represent it. I do not myself say that this difficulty exists to the full extent that my brother thinks, but even it does exist it cannot be sufficient ground for not recognising the force of the right.

I have no doubt that we have never held that the male proprietor, in the circumstances mentioned in the beginning of my judgment, is a full owner. A full owner in jurisprudence is a person who has a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration, or in other words having the fullest and freest right of possession, enjoyment, and disposition. See judgment of Plowden, S. J., in *Gujar v. Sham Das*, 107 P. R. 1887 F. B.

Now, the male owner aforesaid cannot in customary law be full owner if his right of disposition is restricted. This is clear on juristic principles apart from the technical language of particular systems of law. The words "full owner" used with reference to such a person in the judgments cited by my brother do not lay down any contrary doctrine. The words must not be dissociated from the context and should be interpreted with reference to it. They are mostly used in contradistinction to the estate of a widow and to emphasize the enlarged powers and the superior position

(1) s. c. 31 P. L. R., 1907, (F. B.)

(2) s. c., 117 P. L. R. 1903, (F. B.)

of the male holder. They cannot override the true meaning of ownership in jurisprudence nor are meant to do so. The judgments all postulate the restriction on the right of disposition by reversioners or expectant heirs and this at once limits connotations of the words. No benefit therefore can be derived from their use in deciding the present controversy.

Whether the expression "residuary" interest is strictly correct or not, the theory of agnatic succession in Punjab Customary Law assumes that the next heirs have the right to ask the holder of ancestral land that he should do nothing to prejudice their right of succession or the devolution of the land to them in order of legal sequence except for good cause. What is good cause has been settled by a course of decisions. The true theory of the original tenure of such land probably is that the holder had the fullest right to enjoy possession of it provided he did not interfere with the natural course of devolution. Strictly speaking his position was somewhat analogous to that of the holder of an estate for life, but the exigencies of society soon superadded to it powers of disposition under certain circumstances. I am not laying any stress on this theory but merely making suggestion how his estate could have grown. It is beyond question that the widow's estate, which is more than a mere life estate and carries with it considerable powers of disposition, was a mere outgrowth from the right of maintenance and this theory about the growth of the male proprietor's estate does not therefore appear to be far fetched or improbable.

But whatever the reason, the right is a tangible one, capable of being enforced in a Court of law by means of a declaratory suit in the life time of the male owner who alienates and ejectment of alienees who hold under transfers not made for necessity after his death. Surely this right necessarily implies a substantial interest in the property.

I am not prepared to admit that the restriction on the male owner's power of disposition applies only to voluntary transfers. It has been held that decrees obtained against the childless owner do not necessarily bind the heirs who can show that the debts are not just debts, and I should think Court sales under such decrees would form no exception to the right of the heirs to object. If the right had been limited to voluntary transfers it would have been circumvented in hundreds of cases and would have been practically unenforceable.

It is admitted that if the owner had sold his land in order to gratify his vicious inclinations the sale could have been avoided. I think there

can be no doubt that if he had contracted debts for indulgence in vice those debts could have been disputed and could not have caused loss of the land by transfer through Court. That Court sales of land have been lately abolished does not affect the argument. If the complainant had sued the plaintiff's father in this case for damages for the wrongful act for which he was prosecuted criminally and punished, can it be said the decree would have bound the land? If not, how can the sale by the Criminal Court for his absconding in order to avoid arrest for his crime be said to have a greater effect.

Section 88 of the Code of Criminal Procedure speaks of the attachment of the property of the absconding criminal. It throws no light on the question for our consideration. The same language is used in Sections 61 and 62 of the Indian Penal Code in regard to forfeiture by the convicted person. The question what is his property is to be settled by reference to the civil law, that is, customary law or the personal law of the criminal. In this connection the opinion of Mayne cited by the learned Chief Judge is very pertinent as to the true effect of these sections.

Mr. Justice Johnstone holds that the destruction of the reversioner's interest is a hardship which ought to be removed by amendment of the law. It is not clear how, if the reversioners have no right of property at all, their rights can be protected, unless such right is created and declared by law. If the right does not already exist there is no case for asking the Legislature to pass a law to save it from forfeiture or sale. Nor can legislation of this special character, creating and declaring the right only for this Province, be justified. The same rule must be enacted for the rest of India where, at present, except in families governed by the *Mitakshara* law of joint property, the male holder is the absolute owner, and where sale or forfeiture means the total deprivation of the heirs. The enactment, if made, will then be not a declaration of the reversioners' right in the Punjab but an amendment of the criminal law reducing the effect of the forfeiture or of sale to the life-time of the convict or absconding criminal. This cannot be expected.

It is true that such interest as the plaintiff possesses in his father's land cannot be transferred or attached in execution of decree. This is due to other provisions of the law based on public policy, but it cannot have any bearing in negating the right which is clearly proved to exist on cogent evidence. The argument would apply with equal force

to the right of a reversioner of a widow, but it will hardly be contended that such right can be affected by any forfeiture on the widow's conviction or by a sale in consequence of her absconding from arrest for an offence. Mr. Justice Johnstone admits that it cannot.

I think it unnecessary to go into other grounds in detail for holding that the reversioners' interest is not affected. I consider that plaintiffs' suit should succeed in so far as the point before the Full Bench is concerned, and I accordingly concur in the reply given by the learned Chief Judge on that question.

REVISION SIDE.

No. 157.

CRIMINAL.

Before Mr. Justice Kensington and Mr. Justice Johnstone.

VIRU MAL,—(COMPLAINANT),—PETITIONER,

versus

SADDU, AND OTHERS,—(ACCUSED)—RESPONDENTS.

CASE No. 1435 OF 1907.

Revision—Criminal cases—Acquittal on facts—Discretion—Expunging findings from judgment—Sanction to prosecute—Approver—Pardon—Withdrawal of—

Held, that the revisional powers of the Chief Court against orders of acquittal are not confined to points of law but extend in exceptional cases to questions of fact also, though the Court in doing so cannot then and there convict but can only order a new trial.

Held, also, that the Chief Court should revise orders of acquittal wherever justice requires that it should do so, the exercise of revisional jurisdiction is not affected by the fact that no appeal has been filed by Government against the order of acquittal.

The Chief Court under the peculiar circumstances of the case refused revision of the order of acquittal though ample grounds existed to set aside the order.

The order of prosecution of the approver for perjury was set aside as not warranted by the facts of the case.

The Chief Court held that the remarks of the Sessions Judge about a certain witness, the approver and the police were uncalled for and not justified by the materials on record.

Petition under Section 439 of the Criminal Procedure Code, for revision of the order of H. A. Kose, Esquire, Sessions Judge, Multan Division dated the 18th July 1907, acquitting the accused respondents.

Mr. Oertel, Advocate for Petitioner.

Mr. Shah Nawaz, Advocate, for Respondents.

ORDER.

JOHNSTONE, J. (18th January 1908).—I have now read the record carefully and as at present advised I am of opinion that the learned Sessions Judge has wrongly acquitted these four accused, or at least some of them. I merely sent for files in the first instance, because this Court will not *revise* an acquittal unless the circumstances are exceptional and I wished to see whether the case was a good one for revision. I am inclined to think it is, and that it should come before a Bench.

It is not necessary that I should at this stage give all my reasons for this view; but I will note a few points in which, in my opinion, the Sessions Judge has erred. From the very beginning he seems to have conceived a strong bias against *Chaudhari* Ram Kishan and the prosecution, for he begins almost at the very commencement of the trial to cross-examine witnesses severely and to have their previous statements brought on the record. I am unable to see that this course was justified on a comparison of these statements with what the witnesses deposed in the Sessions Court, *vide*, for example, the depositions and previous statements of Sawan and Viru.

Next the plot which *Chaudhai* Ram Kishan and the Police are supposed to have concocted is one which is difficult to credit. I do not think the accused, who confessed could have been got by any inducements and no inducements have been made out or even suggested to put themselves into such jeopardy as they find themselves in merely to please Ram Kishan. The accused in withdrawing their confessions give a very different reason as to why they made them.

Again, the supposed intentional weaknesses in the prosecution evidence introduced with the aim of ensuring accused's acquittal, are not nearly so important as Mr. Rose makes out. What he calls the *wajjh takkar* evidence may be padding, but it is not clear that it is really impossible or improbable in itself; and it is not correct to say that Kewal Ram, witness is a servant of the Chaudhri's though he may have been at some past time.

The comments on the track evidence are quite beside the mark, the path on which the murder was done was *hard and narrow*, see the tracker's evidence, and yet the Sessions Judge says the spot is one on ground, "where tracks are ordinarily identifiable."

Again, I cannot accept the theory as probable that Viru, the deceased's brother, would plot to implicate in form four innocent persons

with the intention that the four should get off, simply in order to screen the real murderer of his brother. This seems contrary to human nature, and also contrary to legitimate inference from the circumstance that it is he who is now strenuously pushing for the conviction of the aforesaid four men.

Again, the approver's tale is consistent and by no means improbable. There is strong reason to believe that Palia deceased was a gay Lothario and that the three injured husbands had only too much grounds for hating him. As to Muhammad Yar approver's joining in the business the Sessions Judge calls him a repulsive looking scoundrel, and yet thinks he would not join in a desperate act of villainy.

Again, the suggestion that the *Chaudhri* got Palia murdered is not well supported. The idea is that it was done because Palia enticed away the *Chaudhri's* mistress Jindi Bai; but of this there is no proof, and even Kariman accused in his statement says the *Chaudhri* gave the woman to Palia, while the lady says she was never the wife of Hara Mal at all. The whole thing is shadowy in the extreme.

Lastly, such an elaborate plot as that suggested could hardly be carried out without the connivance of all the Police Officers who have to do with the investigation, including Messrs. Fitzgerald and Williams.

It is needless to do more than allude to the inadequacy of the Sessions Judge's reasoning in connection with the personal report by the *Chaudhri* and the supposed omissions in it.

I issue notice to all four accused and refer the case to a Division Bench. I also direct that the three connected petitions come up at the same time as this case. The notice will be to shew cause why the order of acquittal should not be set aside.

JUDGMENT.

JOHNSTONE, J.—(13th March 1908).—In this case we have to dispose of four petitions on the revision side and also with an application by the Sessions Judge under Section 339 (3), Criminal Procedure Code, for sanction to prosecute the approver Muhammad Yar. A few words are necessary in order to explain how the case has reached its present stage.

Four persons, Saddu, Qada, Gaman and Kamman, accused of murder, were committed to the Sessions Court of Multan, presided over by

Mr. H. A. Rose, Sessions Judge. All four were acquitted, the learned Sessions Judge finding (briefly) that the charges were not made out, that the confessions of three of the accused, retracted before him, were not genuine, that the approver's story was false, and that Chaudhri Ram Kishen, the *Zaildar*, who made the first report to the police, knew the real facts and probably had more to do with the murder than he will allow. This last finding was more by way of *innuendo* than of categorical pronouncement. This judgment was delivered on 18th July 1907.

In it no orders are passed confirming the pardon or otherwise, it is merely noted that no orders for release can be passed till the District Magistrate has seen the judgment and it is directed that the approver be brought up on August 5th.

On 8th September 1907 the District Magistrate (Mr. Boyd) passed this order "Robkar for the approver's release to issue at once." This was carried out; but on September 18th the learned Sessions Judge, sitting at Dunga Gallv, recorded an order *a propos* of what does not appear, beginning, "I have today sent the following telegram to the District Magistrate Multan:— 'Please re-arrest approver Deva Buddhu 'case. All accused acquitted should be fully examined by selected Magistrate together with any witnesses they name. Intervention of Police in 'investigation highly undesirable. Detailed order follows.'" The order then goes on to explain the telegram and its necessity, the object of the further enquiry being stated to be to ascertain whether it can be proved that the approver's evidence was false.

On the same day (18th September) Mr. Boyd ordered re-arrest of approver without bail and fixed 26th for hearing.

On 17th October, an urgent petition was laid before me, Criminal Revision No. 1373 of 1907 by Muhammad Yar approver, through Mr. Oertel, his counsel. Prayer was for stay of proceedings and release on bail, it being stated that petitioner was being tried, "apparently for perjury," in the Court of Akhwand Abdul Shakur Khan, Magistrate, 1st Class. On same day I passed an order staying proceedings and releasing petitioner on bail and sending for files.

Seven days later, on 24th October 1907, two petitions were laid before me, namely:—

Criminal Revision 1435 of 1907 by Mr. Oertel on behalf of Viru Mal, brother of the murdered man asking, with reference to the acquittal

of the four accused persons aforesaid, that justice might be done; and Criminal Revision No. 1436 of 1907, by the same counsel on behalf of *Chaudhri Ram Kishen* aforesaid, praying that the assertions and insinuations affecting petitioner in the Sessions Judge's judgment of acquittal aforesaid should not be allowed to stand, inasmuch as they were made without good reasons and without evidence to support them.

I sent for files, and having inspected them, on 18th January 1908 I issued an order that notices do go to all four accused persons to appear before a Division Bench of this Court to shew cause why the acquittals should not be set aside.

Meantime, on 14th November 1907 a joint petition (No. 1423 of 1907, Criminal Revision) of *Chaudhri Ram Kishen* and *Muhammad Yar* was laid before me by Mr. Oertel protesting against the aforesaid order of 18th September 1907 by the Sessions Judge and pointing out that an enquiry had been held by *Akhwand Abdul Shakur Khan*, Magistrate 1st Class, and that now another enquiry was being held by Mr. Emerson, Assistant Commissioner. On the same day I passed an order directing that no further enquiry should be held upon this order of the Sessions Judge until further orders from the Chief Court. I understand that notwithstanding this order, a so-called "executive" enquiry was continued by Mr. Emerson.

All the four petitions were to come up together before the Division Bench, and we have heard arguments and have duly considered the case in all its bearings.

On behalf of the accused it is contended that no revision lies at all; but I cannot assent to this as a general proposition. No doubt revisions of acquittals are not to be encouraged, and the High Courts of Calcutta and Madras seem to make a practice of refusing to entertain such petitions. No doubt also the learned Judges who decided the cases reported as 18 *P. R.* 1883 (*Criminal*) and 10 *P. R.* 1900 (*Criminal*) and 9 *P. L. R.* 1902 were averse to allowing revisions of acquittals except on points of law; but I cannot find in the Code itself any warrant for these distinctions and there is no clear *dictum* that such revisions are illegal. I prefer to rely upon the Full Bench ruling in *I. L. R., IX All., 134* and the view taken in *I. L. R., XXII Cal. 998*. In my opinion Section

439, Criminal Procedure Code, and especially its sub-sections (1) and (4) make it clear that this Court can revise an acquittal and set it aside, though in doing so it cannot then and there convict but can only order a new trial. Further I am not impressed by the argument used in some of the authorities that the High Court should never interfere in these cases, because Government can appeal against an acquittal, and if it has not done so, it is no affair of the High Courts. This kind of argument has been anticipated and its effect limited by the enactment of sub-section (5) of Section 439 aforesaid: the meaning is only that Government not having appealed, cannot ask the Court to revise an acquittal. I can find no bar against this Court's revising wherever justice requires that it should do so.

But, though I am of opinion that a revision is competent, I do not think we should order a new trial in this case, and I take this view notwithstanding the fact that I am not at all satisfied with the learned Sessions Judge's method of dealing with the case. In my admitting order I have noted some of the prominent faults in his procedure and attitude and in his opinions regarding the evidence; but I would like to put the matter now thus:—

- (a). At an early stage of the case the Sessions Judge seems, without any recorded materials, to have conceived a strong suspicion against *Chaudhri Ram Kishen* and so against the Crown witnesses, *tests* the unnecessary bringing on the record of his Court of the depositions made by them before the Magistrate.
- (b). The assumption, without any proof on the judicial record, of a deep and complicated plot of a most improbable kind between the *Chaudhri* and the police and the four accused in pursuance of which these four men (or some of them) were to confess to the murder and produce bloodstained clothes and so forth, while the police were so to manipulate the evidence that the confessions and crown evidence would be disbelieved and so the four would escape, attention being thus diverted from the real murderers.
- (c). The very grave insinuations against the *Chaudhri*, based upon really nothing in the Sessions file, regarding not only his supposed bad faith in the investigation of the case but also his connection with the murder itself. I consider that these

insinuations should never have been made and are quite unjustifiable. There is, first, the sneer at the *Chaudhri* for reporting the murder at the Thana in person, but this was his duty, he being *saildar*, and it has come to light that he was not long before reprimanded for failure in this sort of duty. Next, the fact that in reporting the *Chaudhri* did not mention that the murdered man's wife had been a mistress of his own, is mentioned as suspicious. The whole matter is very obscure, and if the lady ever was the *Chaudhri's* mistress, it was five years or more ago. I can see no reason why the *Chaudhri* should have made any allusion to the matter. The idea that it had any connection with the murder is absurd. Thirdly, the following passage in the judgment is I consider unjustified by the record and most unfortunate as a judicial pronouncement.

"In justice to the *Chaudhri* and the police I ought to say at once "and in the clearest possible terms that they have never for a moment "attempted to compass the death of these accused. Whether the *Chaudhri* was afraid that he himself might be suspected of the murder or "not, it is due to him to say that he never wished to see any one else "hanged for it. *Accused's prosecution was a painful necessity* but the prosecution evidence ensures their speedy acquittal." The underlined passage is peculiarly damaging to the *Chaudhri's* reputation, and he had had no opportunity of meeting charges like this.

Fourthly, in reference to Muhammad Yar it is said—"If this man "is a hired assassin, a fact not by any means impossible, he is the employee "of a far wealthier and more powerful man than any one of the accused." In support of this there is not the smallest particle of evidence, and naturally the *Chaudhri* takes it as an allusion to himself.

Fifthly, the Sessions Judge in summoning up says, without, in my opinion, any foundation for such a sweeping charge.—"The prosecution.....is of that class in which the police collude with the accused to protect them or him from conviction." And later the Judge proceeds to discuss the "several social and administrative evils" which the case illustrates, and goes on thus—"It shews the sinister power and influence which a wealthy and thoroughly unscrupulous man is able, under our legal system, to acquire." I state here unhesitatingly that

for this attack on the *Chaudhri* there is on the record no foundation whatever.

- (d). The uncalled for (apparently) charges of negligence and carelessness on the part of the police, including the District Superintendent, and of the Committing Magistrate. These are not directly before me on these revisions; but as these are revisions and I have seen the whole file, I would like to say that for the most part the charges are unjustified on the record.
- (e). On a consideration of the whole record I would not be disposed to sanction the prosecution of Muhammad Yar, approver, for perjury. In my opinion it is by no means clear that he has not told a substantially true story, and this Court should not give sanction under Section 339 (3), Criminal Procedure Code.

While I consider a revision competent, I can see that probably no fruitful result would emerge from a re-trial of the case. Time has passed, and not only does the cloud of discredit lie upon the evidence in the case but the prosecution would be hampered by the natural obscuring of memory in the witnesses. Further, the two successive enquiries into the case since the acquittal are not likely to encourage the prosecution witnesses. I would refuse re-trial and revision of the order of acquittal; but at the same time I would refuse to allow Muhammad Yar to be prosecuted for perjury and would discharge his bail. As to the further enquiries going on into the conduct of the police, and the *Chaudhri*, I think, in view of the above findings and remarks, the local authorities would be well advised to stop them once for all.

It can be well understood that I make these remarks regarding the procedure and attitude of the learned Sessions Judge with great reluctance. Not intending to order a re-trial, I might have simply dismissed Criminal Revision 1435 of 1907 in a few words and have stated that I was opposed to the grant of sanction to prosecute Muhammad Yar and (Criminal Revision 1373 of 1907) that in my opinion no proceedings should be taken against him and his bail should be discharged adding that interference on the line suggested in Criminal Revision Nos. 1436 and 1423 of 1907 was not called for; but the interests of justly aggrieved persons are involved, and I think this Court would fail in its duty if it did not do what it could in the way of condemning the methods

of the Sessions Judge and in removing the damaging misconceptions to be found in his presentment of the case. There should always be a remedy for every wrong, and I can see no remedy for the *Chaudhri* and for the approver but this.

KENSINGTON, J.—(16th March 1908.)—I agree with my learned colleague's proposals for dealing with the various applications before us.

The conclusion from the record appears to me inevitable that the learned Sessions Judge began the trial with a pre-conceived opinion that a false case had been concocted. It might, or it might not, have been proper for him to form this opinion after the evidence had been taken, but in that case the judgment should have contained a fuller and clearer summary of the prosecution evidence, and a temperately written statement of the grounds upon which the conclusion was arrived at. As the record stands many of the remarks made in the judgment are in my opinion also not justified, and some of them should certainly not have been made at all. The general remark which I am inclined to make is that the trial was not conducted in a proper judicial spirit.

If the final conclusion was at all justifiable the opinion of the assessors should have been taken separately and in some detail as regards the various points for consideration in the case. There is nothing in the very brief record of their opinion that the charges against the accused were not proved to indicate how far the Judge's conclusions were supported by the assessors.

As a minor matter in the case I should like to invite attention to the apparently injudicious remarks and orders passed when the witness Kewal was examined (pages 52 and 53). These should be considered with the Civil Surgeon's letter of 18th July, at page 136.

I must also say that the manner in which the approver has been so far dealt with does not commend itself to my judgment. It may have been, and read in the light of his statements it probably was, an error of judgment to tender a pardon to Muhammad Yar during the investigation, but this does not justify an assumption that his evidence was wholly false. We must determine the question of his further prosecution by the record before us, and on that record a sufficient *prima facie* case has not been established. It is indeed difficult to see how the falsity of his evidence can be now affirmatively established in a matter as to which there is so much scope for difference of opinion.

I agree with my learned colleague that it is open to us to take the extreme step of directing a new trial, but that this step is not desirable in view of the very serious complication which has followed from the manner in which the case has been conducted both during the trial and subsequently. We do not know precisely how far matters have since gone, but in my opinion also the District Magistrate will be well advised to stay his hand. That there may have been a failure of justice is unfortunately not improbable. In our judgment this must be accepted as a consequence of the form which the proceedings have taken from the start, and matters have reached a stage at which no useful result can be hoped for from further action.

APPELLATE SIDE.

No. 158.

CIVIL.

Before Mr. Justice Chatterji, C. I. B., and Mr. Justice Chevis.

Sardar NABAIN SINGH, AND ANOTHER, —(DEFENDANTS),—APPELLANTS,
versus

Sardar HIRA SINGH, —(PLAINTIFF),
 AND
Mussammat JAWALA DEI, —(DEFENDANT), } —RESPONDENTS.

CASE No. 1326 OF 1907.

Custom—Hindu Law—Alienation by male proprietor—Will—Jhiwars of Jugātpur Bazāz, Amritsar District, Evidence—Wajib-ul-arz—Attestation of, by non-agriculturist leading men in village—Ancestral property.

Held, that the family of the parties belonging to Jhiwar caste and holding land which they did not cultivate themselves were not shown to be governed by agricultural custom and were therefore subject to their personal law.

That from the mere fact of a non-agriculturist person who is a leading man in the village attesting a *Wajib-ul-arz* of the village it does not follow that he meant to acknowledge that his own particular family followed the same custom as other families in the village.

Quære,—Whether land purchased by a father for the benefit and in the name of his sons is ancestral land in the hands of his son? *Chatterji* and *Chevis, JJ.* held different views on the point.

First appeal from the decree of F. B. R. Spencer, Esquire, District Judge, Amritsar, dated the 29th July 1907, decreeing plaintiff's claim.

Pandit Sheo Narain, Pleader, for Appellants.

Pandit Ram Bhaj Datta, Pleader, for Respondents.

JUDGMENT:

CHEVIS, J. (26th May 1908).—The genealogical tree is given on page 1 of the paper book. *Sardar* Thakar Singh having bequeathed all his property, moveable and immoveable, to his widow with reversion to his brother, Bhagwant Singh; and defendants Narain Singh and Attar Singh, the plaintiff, son of another brother of the testator, sues for a declaration that the Will shall not affect his reversionary rights after the death of the widow.

The defendants plead that the parties are governed by Hindu Law and not by custom, and that Thakar Singh had power to make the Will. They also plead that the property is ancestral and that the bequest was made for services rendered.

The District Judge has held in plaintiff's favour on all points and has given plaintiff a decree. Defendants appeal.

In this Court plaintiffs have wisely given up their claim so far as the moveable property is concerned.

As to the immoveable property the questions are—

- (1) Are the parties governed by custom?
- (2) Is the property ancestral? and
- (3) Was the bequest valid according to custom, and was it for services rendered?

The history of the family is to be found in the statement made by Thakar Singh to the Deputy Commissioner, see pages 4—12 of the paper book. Ground 5 of the appeal, which attacks this statement and certain other documents as inadmissible in evidence, has been withdrawn before us.

The parties are *Jhiwars*, Ratan Singh, father of Thakar Singh, took service in the *garwai khana* of Maharaja Ranjit Singh, and found favour with his royal master and was made *kumedan garwai*, i. e., commandant of the *garwai khana*. He acquired land in Manian village, but as his two wives did not get on well together, he bought some more land in Jagatpur Bazaz and built a house there for the sons of his junior wife (i. e. Thakar Singh and his brother) and settled them there. The revenue of the village was also settled on these sons; and the sale deeds were executed in their names. Later

on, in *Sambat* 1898 and 1901 (=A. D. 1841 and 1844), Gurdit Singh and Thakar Singh also took service in the *garwai khana*. Then when Ranjit Singh's son was deported to England, the family gave up service and went to Jagatpur Bazaz, where they have since lived on their estate. Ratan Singh died in *Sambat* 1902 (=A. D. 1845). In 1893 Hira Singh sold some land to one Partab Singh, and in (or about) 1899 Hira Singh's son sued for a declaration that the sale should not affect his reversionary rights. The District Judge held that the land was not ancestral; that the family were bound by custom as they lived in a village and were dependent on land; and that the sale was for necessity, so the suit was dismissed. The Divisional Judge agreed and dismissed the appeal.

By another sale Hira Singh had sold some land in 1872. This sale was also attacked by the vendor's sons but without success. In this case appeal lay direct to the Chief Court, which dismissed the appeal, holding that plaintiff had failed to prove that the suit was within limitation; that the property was self-acquired; and that the sale was for necessity. (See First Appeal No. 1366 of 1899). The Chief Court did not call on the counsel for respondent in this case, and did not touch on the question whether the parties were governed by their personal law or by agricultural custom. Where the family originally came from is not disclosed from any thing on the record. It is urged that Manian is a village of *Kahars* as is evident from its name *Manian Kaharan*. But it may have got this name from Rattan Singh *Kahar*. There is nothing to show that this village was the home of Kahan Singh's parents. And as regards Jagatpur Bazaz, there is absolutely nothing to show that any *Kahars* except Kahan Singh's family reside there. The present defendants were not parties to the former litigation, so the decisions therein are not binding on them. Besides the decisions in the District and Divisional Courts are not binding on this Court, and the question whether custom or personal law applied was not considered in the Chief Court in the former case, it being unnecessary to do so as the suit failed on other grounds. Had it not failed on other grounds, respondents' counsel would have been heard and might have persuaded this Court to dismiss the appeal on the ground that custom did not apply. There is in my opinion no sufficient ground to hold that Kahan Singh, a *Kahar*, coming from no one knows where, was originally governed by custom.

It is urged that he must have become subject to custom under the influence of his *Sikh* masters, but until he had acquired some land, the question of what powers he or his sons had as regards alienation of land could not arise. Since the family acquired land nothing whatever has occurred, so far as has been shown excepting the above mentioned litigation, to show whether the family has become subject to custom. No doubt they have lived in a village and are dependent on the produce of land, but they have never been agriculturists. They have cultivated the land through tenants or servants, they have never ploughed themselves. Their position seems to me rather that of a country squire than of a farmer or in other words they have been more like a *zamindar* as known in Oudh and Bengal, than a *zamidur* as known in the Punjab. They continued to serve in the *garwai khana* till the royal family ceased to exist as such, and after that they gave up service and lived as squires on their estate. It seems to me a different case to that of members of a non-agricultural tribe (*Brahmans &c.*) giving up their original calling and becoming agriculturists. Nor can it be said that the family has for several generations been settled as agriculturists; Thakar Singh, who made the Will in question was the son of Kahan Singh, the first so far as is known to settle in any village, so there are only two generations in this case. Why should we assume that Kahan Singh or his son ever gave up their personal law in such matters?

It is urged that *kahars* are a *quasi* agricultural tribe, and become subject to custom much more easily than high caste non-agriculturists, such as *Brahmans* or *Khatris*, and generally speaking this may be true. But here we have a case of a *Kahar*, whose original home is unknown, rising to affluence, buying an estate and settling his sons on it; the sons do not cultivate themselves, but live comfortably on the income of the land. I fail to see any sufficient reason to presume that the very next generation has become subject to agricultural custom. I would therefore hold that it is not shown that custom governs the case and this is sufficient to dispose of the whole appeal, as under Hindu Law a disposition of property cannot be challenged by the owner's nephew.

I have omitted to note that Thakar Singh signed the *Wajib-ul-ari* of the village, but I think he would naturally do this as leading man in the village, and it would not at all follow as a necessity that he meant to acknowledge that his own particular family followed the same custom as the smaller families in the village.

As to whether the property is ancestral or self-acquired, no doubt the land was purchased with Kahan Singh's money, though the sale deeds were in favour of the sons; it is argued that this was a gift to the sons and that the property was self-acquired in the sons' hands (See *I. L. R.*, XXVI Cal., page 227), but my opinion on this point is (though I do not state it very confidently) that according to agricultural custom land so acquired would be regarded as ancestral.

As to the plea that the Will was executed for services rendered, I think the oral evidence as to such services weak and unconvincing.

On the ground that the testator was not governed by custom, I would accept the appeal and disallow the cross-objections (relating to costs) and dismiss the suit with costs throughout.

I have omitted to note that the former litigation seems to have been started by Hira Singh's sons in collusion with their father, and do not in my opinion warrant the presumption that Hira Singh really believed that he was governed by custom.

CHATTERJI, J.—(27th May 1908).—I generally concur with the foregoing judgment. I am rather disposed to hold that the purchase by Ratan Singh of the land in the names of his sons was in the circumstances meant to be an advancement for them, and that therefore the land was not ancestral in the hands of Thakar Singh, but this is a small matter in view of our other findings. I think it right to hold that *Kahars* are presumably not bound by the agnatic principle, but by their personal law until the contrary is affirmatively shown.

The appeal is accepted and the cross-objections rejected, and the suit dismissed with costs in all the Courts.

Appeal accepted.

APPELLATE SIDE.

No. 159.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

SOBHA RAM,—(PLAINTIFF),—APPELLANT,

versus

RAM DAS,—(DEFENDANT),—RESPONDENT.

CASE No. 1329 OF 1906.

Civil Procedure Code (Act XIV of 1882), Section 521—Arbitration—Misconduct of arbitrator—Hearing of case ex-parte.

The arbitrators are guilty of misconduct when they hear the case in the absence of one of the parties and decide it on evidence produced by the other party, where there is sufficient cause shown for the absence.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 11th October 1906.

Mr. Beechey, Advocate, for Appellant.

Rai Sahib Lala Sukh Dial, Pleader, for Respondent.

JUDGMENT

SHAH DIN, J. (6th March 1907).—The judgment in this appeal will also dispose of the connected appeal No. 1331 of 1906.

The plaintiff Sobha Ram, sued his nephew Ram Das for recovery of Rs. 1,000 cash, and for possession of 191 *kanals* $6\frac{1}{2}$ *marlas* of land on the allegations that on 29th May 1894 they divided their joint estate between themselves with the exception of Rs. 1,000 in cash, debts due to the family to the amount of Rs. 1,000, and 100 *bighas* of land, which were set apart of maintenance of *Mussammat* Sudhi, grandmother of the plaintiff and mother of the defendant; that the cash was intact on the death of *Mussammat* Sudhi and came into the possession of the defendant, who also had realised the debts for Rs. 1,000; that *Mussammat* Sudhi having died, the plaintiff was entitled to half the share of the property in question.

The defendant pleaded, *inter alia* that *Mussammat* Sudhi had spent in her life time the cash and the sums realised on account of debts; that as these items had been assigned to her as her absolute property she had full control over them; and that he himself had spent Rs. 1,600 on her funeral ceremonies, half of which the plaintiff was bound to pay before obtaining a decree for half the land.

On 20th February 1906 the parties applied to the Court asking it to refer the matter in dispute to certain arbitrators named by them, and the Court made the order of reference accordingly. On the 22nd March 1906 the arbitrators filed their award in Court. The award being in plaintiff's favour, the defendant applied to have it set aside on the grounds that the arbitrators had taken the plaintiff's evidence in the absence of the defendant, who was prevented from attending on the date fixed for evidence owing to the serious illness of his daughter which resulted in her death, and that the arbitrators had not given the defendant an opportunity to produce his own evidence. The Court allowed this objection and setting aside the award proceeded to decide the suit upon the merits.

It found that the defendant was liable for the Rs. 2,000 cash and debts aforesaid, and that therefore the plaintiff was entitled to Rs. 1,000, after deducting from this sum Rs. 400 due from the plaintiff to

defendant, as the former's half share of the funeral expenses incurred by the latter, in connection with *Mussamat Sudhi's* death, the Court gave the plaintiff a decree for Rs. 600 and 50 *bighas* of land

On appeal the Divisional Judge held, with reference to the plaintiff's contention that the first Court should have passed a decree in accordance with the arbitrator's award, dated 22nd March 1906, that he could not go behind the order of the Court setting aside the award, *Ganga Parsad v. Kura, I. L. R., XXVIII All., 408*. On the merits of the case he held, that the Rs. 2,000 cash and debts were assigned to the *Mussamat Sudhi* as her share out of the family property and not merely for her maintenance; that it was not shown by the plaintiff that the money was kept intact until her death, and that then, or previously, it came into defendant's possession; and that though the defendant had performed the funeral ceremonies of the deceased lady, he had failed to prove that the income from her estate was not sufficient to meet the expenses incidental thereto. The decree of the first Court was therefore, modified, to one in favour of the plaintiff for possession of 50 *bighas* of land only.

Both parties have appealed to this Court. In this appeal the first contention raised on behalf of the plaintiff is that the lower appellate Court had full power to go behind the order of the first Court setting aside the award, that the award was set aside on insufficient grounds as no judicial misconduct on the part of the arbitrators had been made out, and that a decree should have been passed in terms of the award. The authorities on the question seem to be rather conflicting. The plaintiff's contention derives some support from the decisions in *Nanak Chand v. Ram Narayan, I. L. R., II All., 181 (F. B.)*; *Abdul Rahman v. Yar Muhamed, I. L. R., III All., 636*; and *George v. Vastian Soury, I. L. R., XXII Mad., 202*, whilst the defendant's position is fortified by the rulings in *Ganga Parsad v. Kura, I. L. R., XXVIII All., 408*, and *Shyama Charan Pramanik v. Prohbad Durwan, 8 Cal. W. N., 390*.

In the view, however, which we take of the case it is unnecessary to come to a decision on the legal point thus raised, as we think, after carefully considering the matter in issue and referring to the record, that the first Court was perfectly justified in setting aside the award of the arbitrators on the ground that the latter had been guilty of judicial misconduct in having taken the plaintiff's evidence in the absence of the defendant, which was wholly unavoidable, and should have been condoned, and in having omitted to give the latter sufficient opportunity to produce his own evidence.

On the merits, after hearing argument and perusing such portions of the record as were relied upon by each party in support of his appeal, we entirely concur in the conclusions come to by the learned Divisional Judge in his considered and carefully worded judgment.

We accordingly dismiss this appeal and the appeal No. 1331 of 1906. The parties will bear their own costs throughout.

Appeal dismissed.

APPELLATE SIDE.

No. 160.

CIVIL.

Before Mr. Justice Chatterji, C.I.E.
 MUL CHAND,—(PLAINTIFF),—APPELLANT,
versus

IMAM BAKHSH,—(DEFENDANT),—RESPONDENT.

CASE No 927 OF 1907.

Contract Act (IX of 1872), Section 16—Undue influence—Document executed when the executant was under arrest.

Held, that the mortgage-deed executed by the defendant in satisfaction of a money decree while he was under arrest was not void on the ground of undue influence for the mere fact of arrest of the defendant could not be held to establish undue influence. *I.L.R., IV All., 352 doubted.*

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated 30th April 1907.

Mr. Shah Nawaz, Advocate, for Appellant.

JUDGMENT.

CHATTERJI, J.—(3rd February 1908).—An appeal is not competent in this case as the suit is for possession and *Ghulam Ghaus v. Nabi Bakhsh* (24 P.R. 1903, (1) F.B.) does not apply. I take it up, however, under Section 70 (I) (b) and (a).

The material facts are briefly these. Plaintiff sues for possession of certain land on the strength of a deed of mortgage, dated 20th May 1901, for Rs. 751-4-0 which he says has fallen to his share by partition with his co-sharers. The consideration for the deed is a decree obtained against defendant in May 1901. The defendant was arrested and kept in custody and was released on or just before executing the mortgage-deed in dispute. Satisfaction of the decree was certified in the Court of execution and the case was filed as a completely satisfied execution by agreement of parties on 8th June 1901.

Defendant pleaded that he had executed the deed under undue pressure and influence and offered to pay the money secured by it by annual instalments of Rs. 50. The plaintiff did not agree and the Court drew issues as to (1) undue pressure or influence and (2) the relief to be given to plaintiff if such pressure or influence was not proved. The Court found on the first issue for plaintiff and decreed the claim, but the Divisional Judge remanded the case in order to find out whether defendant was actually under arrest when he executed the deed.

After remand the parties came to a compromise by which defendant stipulated to pay the amount of the mortgage-money in six monthly instalments of Rs. 100 each payable in Har and Poh each

(1) s.c. 35 P.L.R. 1903, [F.B.]

year, and agreed that in case of failure to pay any instalment plaintiff was to get possession of the land for the balance due which was duly certified and attested in Court. The Munsif returned the case to the Divisional Judge for orders, but the learned Judge deferred passing them until the finding on the issue remanded was submitted after inquiry. The munsif then found that defendant had been under arrest or had just been released therefrom at the time of executing the deed. Therefore the Divisional Judge refused to accept the compromise and holding the deed to be void for coercion dismissed the suit.

The point first argued is that the compromise was a valid one and had been duly certified and attested, and that the Divisional Judge was not justified in setting it aside. The second point is that the arrest was not unlawful but in accordance with law and did not amount to coercion, and that there was no undue influence.

On the first point I am unable to agree with the view of the Divisional Judge. There is no proof whatever of any undue influence or want of free consent, and none was tendered by the defendant. The mere fact that inquiry had been ordered as to whether defendant was under arrest at the time of execution is not a sufficient ground to infer that he had become so sure of winning his appeal that he would not come to terms in any case. Litigants ordinarily do not act with such assurance in a matter under inquiry, for the uncertainties of litigation are well known. Moreover, the terms are fair, and the defendant was thereby enabled to keep possession of his land for a further term in any case, and permanently if he went on paying the instalments. The evidence of the Sub-Registrar, a Muhammadan gentleman of respectability, shows that defendant was not under arrest at the time of executing the mortgage-deed and did not complain of pressure and that consent was to all appearance freely given. Moreover, the learned Divisional Judge entirely forgets that defendant knew he had a debt to pay which had been decreed and which he had again admitted in the deed. In his pleas also in the first Court he had offered to pay it in instalments of Rs. 50 yearly. The Divisional Judge while laying stress on the arrest put the debt altogether out of consideration and shut his eyes to the plaintiff's interests. To my mind in such circumstances a compromise would be very acceptable to the defendant and I think he freely agreed to it.

Moreover, it is not coercion to arrest a debtor in execution of

decree and if this view is taken all arrangements in execution must be rejected for in all such cases there is always the pressure of execution. The pressure, however, is legitimate and under the authorities of execution Court. There may be cases of undue influence in such circumstances but in the absence of other cogent evidence the terms of the arrangement must be looked up to see if any was exercised. The Divisional Judge has ignored all this and held that merely because defendant had been arrested in execution, the deed is *ipso facto* void a proposition for which there is no authority in law. *Banda Ali v. Bansapat Singh*, I.L.R., IV All., 352 does not support the Divisional Judge's position as the execution Court in that case had no jurisdiction. I am disposed also to question the soundness of that ruling. It is needless, however, to pursue this discussion further as I think the compromise valid and must be acted on.

I accept the appeal and reversing the decree of the Divisional Judge grant one in plaintiff-appellant's favour in terms of the compromise. Parties will pay their own costs throughout.

Appeal allowed.
CIVIL.

APPELLATE SIDE.

No. 161.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

JIWA SINGH,—(DEFENDANT),—APPELLANT,
versus

KHAZANA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 422 OF 1903.

Civil Procedure Code (Act XIV of 1882), Section 562—Remand—Preliminary point—Dismissal of suit on the ground that plaintiff has no locus standi to maintain the suit—Custom—Alienation by male proprietor in the presence of adopted son who is minor—Suit by next reversioner.

Where a suit to set aside an alienation by a male-proprietor was dismissed on the ground that the alienor having an adopted son the plaintiff, next reversioner was not competent to sue and it appeared that the adopted son was a minor—

Held, that the dismissal of the suit was wrong for the plaintiff was competent to sue, and that order of remand of the suit under section 562 of the Civil Procedure Code is not illegal in such cases.

Further appeal from the decree of T.J. Kennedy, Esquire, Divisional Judge, Ambala Division, dated 1st February 1906.

Lala Dwarka Das, Pleader, for Appellant.

Mr. Brown, Pleader, for Respondents.

JUDGMENT.

SHAH DIN, J.—(24th April, 1907).—The material facts of this case are as follows :—

One Chandu, a Jat of the village of Lahal in the Tahsil and District of Ludhiana, sold 23 *bighas* 18 *biswas* of his ancestral land by a registered deed, dated 23rd December, 1901, to one Jiwa, defendant No. 2, for Rs. 650. The plaintiffs, who are the brothers of Chandu, sued for a declaration that the sale in question shall not affect their rights of succession to the land sold after the death of the alienor, alleging that the latter was sonless and had no power by custom to affect the sale, which was without consideration and necessity.

The alienor Chandu pleaded that he had adopted Kishen Singh, minor son of Jiwa, defendant No. 2, by a registered deed of adoption dated 3rd August, 1904, that in the presence of Kishen Singh the plaintiffs had no *locus standi* to contest the sale, and that the said sale was in any case valid as having been effected for consideration and necessity. Kishen Singh, minor, having been impleaded as a defendant in the case, the Court framed the following issues:—

- (1) Did defendant No. 1 adopt Kishen Singh and, if so, was the adoption valid by custom?
- (2) Are not the plaintiffs competent to bring this suit in the presence of Kishen Singh?
- (3) Was the sale in dispute effected for consideration and legal necessity?

Upon the first issue the Court found that Kishen Singh had been adopted by Chandu, defendant No. 1, and that the adoption was valid by custom. Upon the second issue it held that, in the presence of the adopted son of Chandu, the plaintiffs had no right to contest the sale in dispute, and therefore without recording a finding upon the third issue, it dismissed the suit.

On appeal the learned Divisional Judge concurred with the first Court in finding the *factum* of the adoption and its validity established, but held that Kishen Singh, the adopted son, being a minor and the plaintiffs' possibility of succession to the estate of Chandu not being very remote, the plaintiffs could maintain a suit for a declaration of the invalidity of the alienation in dispute. It therefore set aside the decree of the first Court and remanded the case under Section 562, Civil Procedure Code, for decision on the merits.

In appeal before us the learned pleader for the defendants contended (1) that the order of remand under Section 562, Civil Procedure Code, was not warranted by the terms of the Section and was therefore erroneous, and (2) that in the presence of the adopted son of the alienor, who is the next heir, the plaintiffs had no right of

suit and that therefore a declaration cannot be granted in their favour.

Now, in regard to the first contention we are of opinion, after carefully considering the argument of the learned pleader in support of his position, that the Court of first instance did dispose of the suit upon a preliminary point (as held by the Lower Appellate Court), and that the Lower Appellate Court was, therefore, justified in remanding the case under section 562, Civil Procedure Code, for disposal on the merits. The first issue drawn by the Court, namely, whether defendant No. 1 "adopted Kishen Singh, and, if so, whether the adoption was "valid by custom" was not, as urged by the learned pleader, an issue on the merits of the case, which obviously relate to the validity or otherwise of the alienation made by Chandu but an issue raised for the determination of the question whether the plaintiffs had any right at all to come into Court to contest the alienation, which question was a preliminary one, *i.e.*, to use the words of Plowden, J. in *Khalas v. Kalyan Singh*, 109 P.R., 1887, a question "collateral to the merits of the case, "the decision upon which in any way may put an end to the whole case "and in another way leaves a subsisting case upon the merits." (See page 252). We are fortified in our view by the decisions of this Court in *Ram Ditta v. Alla Yar*, 98 P.R., 1887, and *Nawahu Ram v. Relu Mal* (Miscellaneous Appeal No. 717 of 1904) and by the decisions of the Madras High Court in *Ramachandra Joishi v. Hazi Kassim*, I.L.R., XVI Mad., 207 page 210 and *Kanakammal v. Rangachariar*, I.L.R., XX Mad., 25 page 27. In *Ram Ditta v. Alla Yar*, 98 P.R., 1887, it was held that the provisions of Section 562, Civil Procedure Code, applied to a case where an appeal was dismissed *in limine* on the ground that the plaintiff appellant had no *locus standi*; while in *Kanakammal v. Rangachariar*, I.L.R., XX Mad., 25, it was held that a suit must be considered to be disposed of on a preliminary point when it was dismissed on the ground that the plaintiffs had no cause of action.

We are clearly of opinion that the question of the *locus standi* of the plaintiffs in the present case to contest the sale in dispute was none the less a preliminary point in the sense of being collateral to the merits of the suit because, as contended by the appellant's pleader, evidence had to be taken in support of the *factum* and the validity of the adoption of Kishen Singh for evidence may have, and has frequently, to be gone into for the decision, for instance, of the question of limitation, and yet the point of limitation is always considered a "preliminary point" within the purview of Section 562, Civil Procedure

Code. So far as the applicability of Section 562 is concerned, it appears to us that it makes no difference whether the plea in bar raised by the defendant in a suit is that the plaintiff's right of suit is lost by reason of efflux of time or whether it is that the right to sue has not yet occurred to the plaintiff by reason of certain circumstances preventing the accrual of such right. In both cases, if the plea is accepted, the result is the same, viz., that the plaintiff's suit is dismissed *in limine* as not being maintainable. We hold, therefore, that the remand by the lower Appellate Court under Section 562, Civil Procedure Code, was perfectly warranted by the terms of that Section.

The next question for decision is whether the learned Divisional Judge is right in holding that the plaintiffs have a *locus standi* to sue for a declaration of the invalidity of the sale in question in the presence of the adopted son of Chandu, who admittedly is a minor. After giving our best consideration to the matter, we think that we must answer this question in the affirmative. The adopted son, whose existence is said to bar the plaintiffs' suit, is a minor, and is, therefore, incapable of exercising his right of veto as regards the alienation in dispute or of giving his consent to it and it is not denied that the plaintiffs are the reversionary heirs next after the minor. Under these circumstances the principle laid down in *Mehtab Khan v. Mussamat Mehtab Bibi* 24 P. R., 1877, would, we think, apply to this case, namely, that, where the nearest heir, entitled to object to an alienation by a proprietor with limited powers, happens to be a minor and as such unable to exercise a free agency, the next reversioner is entitled to sue for the protection of the estate. In that decision Mr. Justice Boulnois observed as follows :—

“A declaration in his (plaintiff's) favour will not amount to a declaration of his right as heir, but merely set the estate free in favour of him, who actually may be the heir. If the first in succession colludes, it seems that the more remote may come in, and without saying how far that principle is to go, it is clear that where the heir is a minor and unable to exercise a free agency, the court is of opinion that this present plaintiff as next heir to the minor is entitled.” The principle underlying this decision appears to us to be perfectly sound and in complete accord with the prevailing sentiment among the agricultural tribes in this Province. The estate in possession of a proprietor with a limited power of disposition and in respect of which there exists some sort of residuary interest in all the descendants of the common ancestor has to be preserved from improper alienations by that

proprietor, and if the person next entitled to succeed to it is by reason of tender age, or other disability, incapable of protecting the estate, the person or persons who would succeed to the estate in the absence of the nearest heir so circumstanced should, in accordance with the fundamental principles which regulate the devolution of ancestral property among agricultural communities in the Punjab, have the right to step in and impeach, such an improper alienation. If the alienation is found by the Courts to be improper and is declared invalid and ineffectual so far as the reversionary rights of the heirs are concerned, the declaration would ensure, to the benefit of all the heirs including the minor who, if he happens to be the next heir, when the succession opens out, will be the greatest gainer by the result of the suit brought by the more remote reversioner.

The same principle is recognised in another shape and under somewhat modified circumstances, in the Full Bench decision of this Court in *Harvans Singh v. Harnam Singh* 84 P.R. 1898, F.B.

The appellant's pleader relied upon *Hayat v. Gauhar* 80 P. R., 1902, as supporting his position, but obviously that ruling affords him no help, as in that case there was no question of the nearest reversionary heir being a minor, and all that was decided was that among *Varaichs* of the Gujrat District, if a *khanadamal* who, according to the custom applicable to the tribes, is entitled to his father-in-law's property, does not object to an alienation in respect of it by the latter, the more remote reversionary heirs, who are excluded by the *khanadamad* in the matters of inheritance, cannot question its validity. No other authority of any relevancy was cited to us by the learned pleader, and we have not been able to discover any in support of his case.

We are, therefore, of opinion that the decision of the learned Divisional Judge is perfectly sound and we dismiss this appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 162.

CIVIL.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

SHADI AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

Mussammatal KHEWNI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 1222 OF 1906.

Custom—Alienation by male-proprietor—Gift to daughter—Consent

of son—Objection by reversioners—Arains of Jagraon tahsil, Ludhiana District.

Held, that among Arains of Jagraon tahsil of the Ludhiana District a male-proprietor's gift of ancestral land in favour of his daughter with the consent of his son cannot be contested by his reversioners.

Further appeal from the decree of Major C. P. Egerton, Additional Divisional Judge, Ambala Division, dated 12th March 1906.

Mr. Fazal Hussain, Advocate, for Appellants.

Mr. Morrison, Advocate, for Respondents.

JUDGMENT.

SHAH DUN, J. (19th July 1907).—Briefly stated the facts of the case are as follows:—

By two registered deeds of gift, dated 6th February 1896, one Hassu, an Arain of Mouza Agwar Ladhahi, Tahsil Jagraon, District Ludhiana, transferred to his daughter, *Mussammat Khewni*, one-half of his proprietary land together with a house and one-half of his occupancy holding, situate in Mouza Agwar Ladhahi. At the time of the said alienation Hassu had a son Qutba who although he did not formally sign the deeds of gift in token of his assent to their validity appears (as will presently be noticed) to have consented to them. It is admitted that two of the reversioners of Hassu, namely, Mamun and Jiwa, defendants Nos. 2 and 4, did expressly give their consent to the gift and they have consequently refused to join as plaintiffs in the present suit. Hassu died in 1897 leaving him surviving his son Qutba who died sometime in 1902 being succeeded by his widow *Mussammat Natho*, who is admitted to have died in January 1905. In October 1905 the plaintiffs who are the reversioners of Hassu brought the present suit for possession of the lands gifted by Hassu in favour of his daughter *Mussammat Khewni* in 1896, alleging that the said gifts were invalid by custom and on the death of the widow of Qutba, son of Hassu, they were entitled to succeed to those lands. Two of the reversioners who had (as we have seen) assented to the alienation in question refused to join as plaintiffs and were impleaded as defendants 2 and 4.

The principal defendant *Mussammat Khewni* pleaded *inter alia* that the alienation in dispute having been made by her father with the consent of the next heir Qutba and of two of the reversioners was perfectly valid and could not be impugned by the plaintiffs. The first Court fixed three issues on the pleading of the parties two of which related to limitation and the third to the question of the

validity of the gift. It found on all points in favour of the defendant and dismissed the suit.

On appeal the learned Divisional Judge without entering into the point of limitation, concurred with the first Court in holding that the consent of Qutba the son and next heir of Hassu, to the gifts made by the latter to his daughter, effectually validated the said gifts against all the remote reversioners, such as the plaintiffs and following *Labhu v. Mussamat Nihali*, 7 P.R. 1905 ⁽¹⁾, he upheld the dismissal of the suit.

Before us Mr. Fazal-i-Hussain for the appellants contends that the principle laid down in *Labhu v. Nihali* 7 P. R., 1905 ⁽¹⁾ does not govern this case, inasmuch as in the first place Qutba, whose consent is said to have effectually validated the alienations, in dispute, did not give his express consent to them (not having signed the deeds of gift, nor having made a statement signifying his assent at the mutation proceedings) and in the second place, even if he did give such consent his consent, was ineffectual on the ground that he was himself a childless old man of 60 with no practical interest in the property of his father which he could feel called upon to protect. We think that this contention though plausible, cannot, in the circumstances, of this case be allowed to prevail. The mere fact that Qutba did not sign the deeds of gift, does not show that he did not give his express consent to the alienations. All that it shows, coupled with other facts among other things, the signing of the deeds by two of the reversioners is that the attestation of the deeds by Qutba was considered by the father and the son as a useless formality, an irresistible deduction from the facts that during the mutation proceedings held on the death of Hassu in 1897, Qutba expressly stated before the officers concerned that his father had made a gift to his daughter and a sale of 1 *bigha* to Phagunal and Behari Lal, and that mutation of the land be made in his favour subject to the said alienations. Besides this, we find it stated before the first Court by Jamal Din, one of the plaintiffs, "that Qutba was in collusion with his sister and so did not question the gift of his father (in her favour), and that of the brotherhood, Mamun and Jiwan had also assented to the gift." This statement is proof positive, if further proof were needed, that the alienations in dispute were made with the express consent of Qutba and two of the reversioners. If, then, such consent is established (and upon the materials before us we must hold that it is), the next question for consideration is, whether this consent given as it was by the donor's son effectually

(1) S.C., 66 P.L.B., 1905.

validated the gifts as against the remoter reversioners such as the plaintiffs. All discussion of the abstract principle raised by Mr. Fazal-i-Hussain as to the effect under Customary Law of the consent of a childless old man who happens to be the next reversioner, to an alienation by a sonless male-proprietor upon the power of remoter reversioners to contest such an alienation, becomes useless in this case by reason of the fact that *prima facie* according to the custom applicable to the parties before us Hassu was empowered to make the gifts in dispute to his daughter with the consent of his son, Qutba. In the Customary Law of the Ludhiana District, prepared by Mr. Gordon Walker in 1885, the rule of custom on this point is thus stated at page 75 :—

Answer to question 87.

“As to immoveable property (or rather land) most tribes say that to enable the proprietor to make a gift of any part of it to the relations mentioned in the question (namely the daughter, the daughters’ son, etc.,) he must obtain the consent of the heirs, the lineal male descendants, or in default of them, the collaterals related to the great grandfather.”

This statement of the custom is clearly in favour of the donee in this case, and nothing has been urged by Mr. Fazal-i-Hussain to show that the custom of the *Arains* of the Jagraon *tahsil* in which the parties reside, is at variance with the above. The rule of custom is expressed in general terms, and no qualifications or limitations, such as the appellant’s counsel seeks to introduce into, or impose upon, it, can be accepted in this case without definite evidence in their support forthcoming. No such evidence has ever been alleged to exist, and we must perforce apply the general rule as we find it enunciated in the available record of custom. In *Labhu v. Mussammatt Nihali*, 7 P.R. 1905⁽¹⁾, we find it stated at page 39: “The right to make a permanent alienation good as against all comers, with the consent of collaterals, which would be bad without that consent is one of the commonest features of Punjab custom.” This observation is in full accord with the custom which appears to govern the parties to this case; and we must, therefore, hold that Hassu was within his rights in making the gifts in dispute with the consent of his son and heir Qutba and that the plaintiffs have no power to challenge those gifts.

The appeal fails and is dismissed with costs.

Appeal dismissed.

[1] s.c. 66 P.L.R. 1905.

APPELLATE SIDE.

No. 163.

CIVIL.

Before Mr. Justice Reid.

MOHAN LAL AND OTHERS,—(DEFENDANTS),—APPELLANTS,

*versus*JANKI,—(PLAINTIFF),—and JOWALI AND OTHERS,—
(DEFENDANTS),—RESPONDENTS

CASE No. 1002 OF 1907.

*Limitation Act (XV of 1877) section 28, Schedule II, Article 148—
Adverse possession—Immoveable property—Right to birt—Exclusive
enjoyment by mortgagee.*

The right of a Hindu to *birt* is in the nature of immoveable property and article 148 of the second Schedule of the Limitation Act governs a suit for redemption of a mortgage thereof.

Section 28 of the Limitation Act is applicable to a claim to a mortgagee's right to *birt*, such right being on the footing of a mortgage of immoveable property.

And exclusive adverse enjoyment of *birt* by the mortgagee or his representatives for more than twelve years extinguishes the right of persons claiming a share to the mortgage money in a suit for redemption.

*Further appeal from the decree of S. Clifford, Esquire, Additional
Divisional Judge, Delhi Division, dated 9th June 1906.*

Lala Jagan Nath, Pleader, for Appellants.

Lala Dwarka Pershad and Lala Shamir Chand Pleaders for
Respondents.

JUDGMENT.

REID, J.—(6th February, 1908.)—This is a suit for redemption by the representative of the mortgagor, and the question for decision is, which of the parties claiming to represent the original mortgagee is entitled to the mortgage-money? The subject matter of the mortgage was the right to *birt* offerings in Rohtak for 5 days out of 26.

The pleaders for the defendant-respondent attempted to support the decree of the Lower Appellate Court by the contention that the appellants have no *locus standi*, and should not have been impleaded on their own application, being entitled to sue the defendant-respondent separately for so much of the mortgage-money as might be realized by the latter. This contention has, in my opinion no force, the appellants claiming to be interested in the mortgage, and consequently entitled to be parties to the suit. The respective claims of the appellants and the defendant-respondent could be decided in the suit, and the refusal to implead the former would merely have led to further litigation. On the merits I see no reason for interference

with the learned Divisional Judge's decision, that the defendant-respondent's possession for thirty years of the right to *birt*, adversely to the appellants, has vested in him a right, indefeasible by the appellants, to the mortgage-money on redemption.

In *Raghoo Pandey v. Kassy Parey* I. L. R. X Cal., 73, it was held that the right of a Hindu to *birt* was in the nature of immoveable property, and that Article 148 of the Limitation Act governed a suit for redemption of a mortgage thereof, and no authority to the contrary was cited at the hearing. A mortgage of *birt* is, therefore, property, for the possession of which a suit can be instituted, and is recoverable as such, the period of limitation for a claim thereto being 12 years. *Gursahai v. Karam Chand* 8 P. R. 1901, (1) cited for the appellants, is distinguishable, the suit dealt with therein being for a permanent injunction to restrain the defendant from receiving *birt* from *Jujmans* on the ground that no one within a certain area, except the plaintiff's family, had any right to recover the same. It was held that the rights of *Jujmans* to select their own *Acharaj* could not be fettered.

Rights of rival claimants to the subject matter of a mortgage are obviously on a footing differing from that of rival claimants to take *birt* from a certain *Jujman*, inasmuch as the person in the shoes of the mortgagee was entitled to the mortgage-money on redemption. The logical result of a mortgage of *birt* rights, being on the footing of a mortgage of immoveable property, is, in my opinion, the application of section 28 of the Limitation Act to a claim to a mortgagee's rights in *birt*.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) S. C. 136 P. L. R. 1901.

FULL BENCH.

APPELLATE SIDE.

No. 164.

CIVIL.

Before Sir William Clark Kt. Chief Judge, and Mr. Justice
Chatterji C. I. E., and Mr. Justice, Rattigan.
DHANPAT MAL,—(DEFENDANT),—APPELLANT,

versus

JHAGGAR SINGH, AND OTHERS,—(RESPONDENTS),—PLAINTIFFS.

CASE No. 159 of 1908.

*Civil Procedure Code (Act XIV of 1882) Section 13—Res-judicata—
Mortgage—Redemption suits.*

Held, by the Full Bench, following the principle of *stare decisis*, that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption.

Further appeal from the order of the Divisional Judge, Ferozepur Division, dated 13th May 1907, modifying the decree of the Munsif, 1st Class, Ferozepur, dated 23rd October 1906.

Mr. Sukh Dial, Advocate, for Appellant.

Mr. Durga Das, Advocate, for Respondents.

JUDGMENT.

CLARK, C. J.—(20th May 1908).—The question referred to the Full Bench in this case is, whether it is open to a mortgagor who has brought a suit for redemption and obtained a decree, to bring a second suit for redemption or whether in such a case the second suit is barred by reason of the decree in the first suit?

Upon this question there is a conflict of authority. In favour of the mortgagors right to bring such second suit (or third or any number of such suits) we have the rulings of this Court in Nos. 86 P. R., 1877; 14 P. R., 1881; 132 P. R., 1882; 20 P. R., 1887 10 P. R., 1888; 100 P. R., 1905.⁽¹⁾ To a like effect are the earlier decisions of the Madras High Court (I. L. R., VI Madras 119; VII Madras 423; VIII Madras 478; XV Madras 366; XXI Madras 18). The Calcutta High Court has given no decided opinion upon the point. In one case it was held that such subsequent suit would lie (22 W. R. (C. R.) 172;) in an other case the contrary opinion was expressed (I. L. R., XVIII Calcutta 139). The Bombay High Court and the Full Bench of the Madras

(1) S. C., 16 P. L. R., 1906.

High Court held that a second suit is barred (*I. L. R., VII Bombay 467; I. L. R., XIII Bombay 567; I. L. R., XXV Madras 300*). A similar opinion was expressed by Edgr. C. J. and Blair J. in the case of *David Hay v. Razi-ud-Din* (*I. L. R., XIX Allahabad 202*). But the F. B. of that Court has recently dissented from that view (*I. L. R., XXIV Allahabad 44*).

We are ourselves not agreed upon this question and under the circumstances we think that the principle of *stare decisis* should be adhered to. The question is one of great difficulty and opinions upon it may well differ, as the ruling's above referred to show.

We accordingly hold that the principle enunciated in No. 86 P. R., 1877 should be accepted as the law for this Province.

APPELLATE SIDE.

No. 165.

CIVIL.

Before Mr. Justice, W. Chevis, Judge.

SUKHA AND OTHERS,—(DEFENDANTS),—APPELLANTS,
versus

ARURA MAL,—PLAINTIFF,

AND

LAL KHAN,—DEFENDANT,

}—RESPONDENTS.

CASE No. 498 OF 1908.

Custom—Pre-emption—Re-sale to vendor.

Where before the institution of a suit for pre-emption of land the vendee had resold the land to the vendor and it was contended that the re-sale was a bar to the suit—

Held, that the contention was not valid *I. L. R., XXIX All., p. 125 dissented from.*

Further appeal from the order of W. A. Harris, Esquire, Divisional Judge, Shahpur Division, dated the 8th June 1907, affirming that of Sardar Balwant Singh, Sub-Judge, 1st Class, Bhakkar District Mianwali, dated the 4th March 1902, decreeing the plaintiff's claim.

Mr. Shah Nawaz, Advocate, for appellants.

Mr. Devi Dial, Advocate, and Lala Dharm Das, Suri, Pleader, for respondents.

JUDGMENT.

CHEVIS, J.—(18th June 1908).—Sukha and Pathana sold the land in suit to Lal Khan on 15th July 1901. Lal Khan resold it to Sukha and Pathana on 13th October 1901, plaintiff brought this suit to pre-empt on 15th February 1902. The lower Courts have decreed the suit, holding that the resale is not bar to plaintiff's claim. Sukha and Pathana appeal. The only question in appeal is whether the resale is a bar to the plaintiff's claim. There is a ruling *XXIX All.*, page 125, which is distinctly in appellant's favour. Sukha and Pathana only sold a half share in their well, so all along they have been co-sharers, and so the case is on all fours with the Allahabad ruling. On the other hand, there is a ruling of this Court, Civil Appeal No. 886 of 1902, which is clearly against the appellants, and to my thinking that ruling goes into the case more thoroughly than the Allahabad ruling does.

If A, B and C were all co-sharers, and A sold his share to an outsider D, and D then resold to B, no doubt B would be able to resist a suit by C. But if D resold to A, could A then resist a claim to pre-emption by C? Is there any difference between the two cases? This has not apparently been considered in the Allahabad ruling. The Punjab ruling holds that there is a difference, and holds that as A could not have stood up as a rival pre-emptor as against B or C, had there been no resale at all, he cannot defend a suit by B or C on the ground that there has been a resale to himself. What we have to look to is, as pointed out in the Punjab ruling, who has the best claims to pre-empt as regards the original sale, not as regards the second sale. As pointed out in the Punjab ruling if we were simply to see who had the best right to pre-empt as regards the second sale, absurdities would arise, *e. g.*, if pre-emption depends upon relationship, and A sells to B (a stranger) and B resells to his own brother C, then A's brother cannot claim to pre-empt as against C, if we are simply to see who has a right to pre-empt as regards the second sale. So obviously we must see how claims stand as regards the first sale, and here A cannot claim to pre-empt at all, as he is himself the vendor. It is admitted that if there had been no second sale at all, the vendors could not have set up a rival claim to pre-empt as against the plaintiff. And agreeing with the Punjab ruling,

I hold that they cannot defeat the plaintiff's claim by reason of a resale to themselves.

Other rulings have been quoted but are inapplicable, as none of them cover the case of a resale to the original vendor.

The appeal fails and is dismissed with costs.

APPELLATE SIDE.

No. 165.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Chitty.

GIRDHARI RAM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

FAIZULLAH KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 541 OF 1904.

Custom—Alienation by widow—Right of remote collaterals to object in the presence of near collaterals and daughters of alienor—Calculation of degree of relationship.

The plaintiffs collaterals in the sixth degree of a sonless proprietor sued to contest an alienation of ancestral property made by his widow. The defendant pleaded that in the presence of nearer collaterals, some of whom had consented to the alienation, and daughters of the proprietor, who did not object to the alienation, the suit did not lie. According to custom collaterals up to and including the fifth degree excluded daughters inheriting ancestral property of their father. It appeared that some of the near collaterals had not assented to the alienation and that the daughters were not likely to object.

Held, that the pleas had no force.

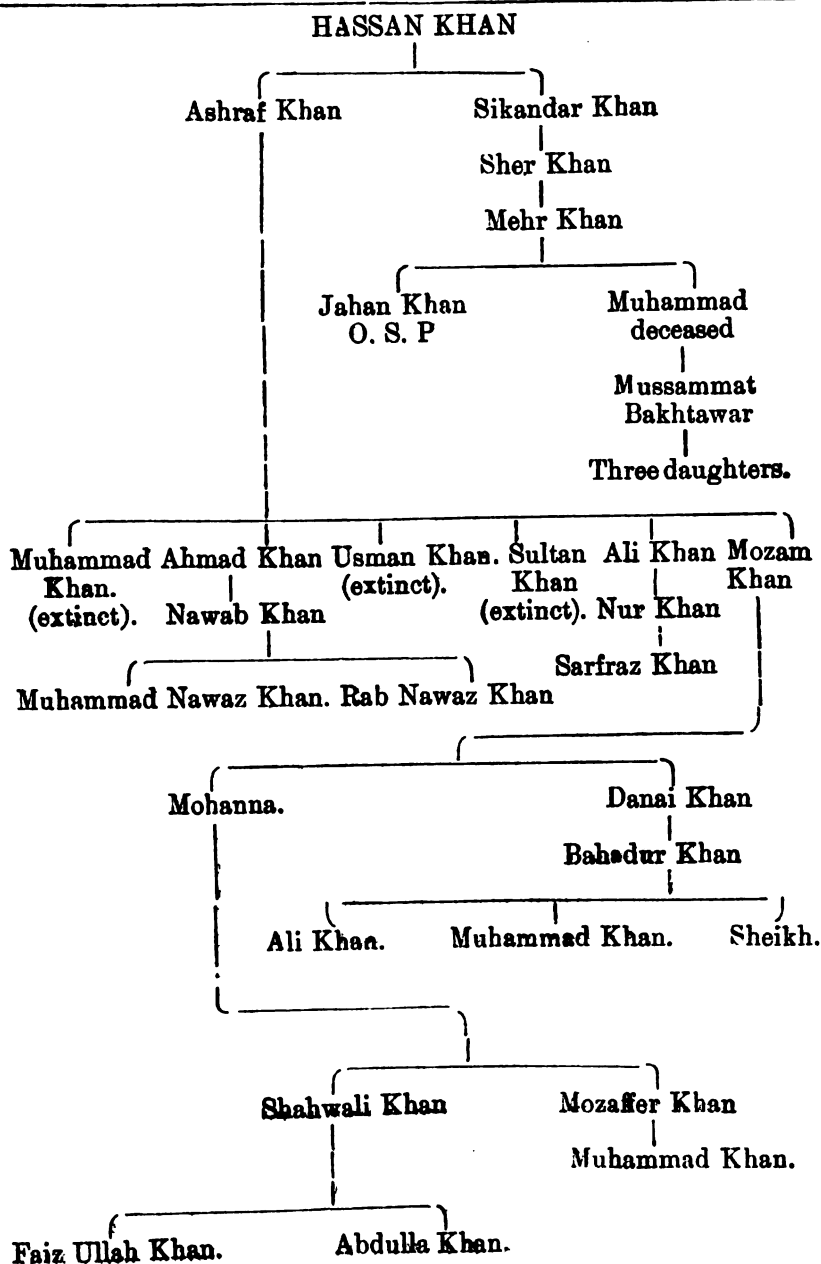
Further, that according to custom of the Bannu District, the mode of computation of degrees of relationship of the collaterals was from the collateral to the common ancestor, both being counted.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Shahpur Division, dated 6th February, 1904.

Lala Dwarka Das, Advocate, for appellants,

JUDGMENT.

CHITTY, J.—(12th April, 1908).—The subjoined pedigree table will explain the relationship of the parties in this case.



The plaintiffs, who are two out of several descendants of Ashraf Khan now living, seek to contest an alienation by way of sale effected by *Mussammat Bakhtawar*, the widow of their deceased collateral, Muhammad. The first point to be determined is whether the plaintiffs are entitled

to sue, and for this purpose it must be ascertained what is their degree of relationship to the deceased. It was no doubt laid down in *Ladhu v. Mussammats Daulati and Allah Bibi* 126 P. R., 1890, that according to the general custom of the Punjab, in calculating degrees of relationship, the proper course is to reckon on the generation commencing with and including the deceased upwards until the common ancestor is reached, he being also counted and included and that it is of no consequence by how many generations the collaterals are removed from the common ancestor. This mode of computation was accepted and employed in *Nur Muhammad v. Ghulam Habib* 106 P. R., 1892; but a doubt has since been expressed whether it can be said to be the general custom (see *Dilwar v. Mussammat Jatti* 2 P. R., 1901⁽¹⁾ in which the case of *Rehmat Husain v. Mussammat Fahim-un-nissa* 25 P. R., 1890, seems to have been quoted by mistake for the case of *Ladhu v. Mussammats Daulati and Allah Bibi* above cited). It is certainly open to this objection, that it makes no distinction between the collaterals themselves. In this case, however, it is unnecessary to go further into the question because we have evidence that in the district before us, *tahsil* Isa Khel, the mode of computation should be from the collateral to the common ancestor, both being counted. The *riwaj-i-am* of this *tahsil* is silent on the matter, but that of the neighbouring *tahsil*, Baunu, clearly lays it down, and gives a concrete example, which puts it beyond a doubt. We agree, therefore, with both the Courts below that this method of reckoning should be employed and the plaintiffs, regarded as collaterals of the 6th degree. Two objections were raised to their right to sue—(1) that other descendants of Hassan Khan, nearer in relationship than the plaintiffs, had consented to the sale, *e. g.*, Sarfraz Khan, Muhammad, Nawaz Khan and Rab Nawaz Khan, and (2) that plaintiffs could not sue in the presence of daughters of Muhammad, who would succeed as heirs to his estate before the plaintiffs. The first objection is clearly untenable. It is now well settled that the fact that the plaintiff is not the nearest reversioner will not be a bar to his right, and that where a nearer reversioner consents to the alienation, or stands aside and refuses to sue, a more remote reversioner may come in and contest the validity of the alienation (see *Garib Khan v. Mirza Ali Buhadur Khan*, 7 P. R., 1893 and *Harvans Singh v. Harnam Singh* 84 P. R., 1898, F. B. The degree of relationship will no doubt be considered, and where the suit is purely speculative, and the plaintiff has a very remote chance of inheriting, the Courts will in their discretion refuse him relief. That, however, is not the case here. The

(1) a. c., P. L. R., 1900, p. 318.

plaintiffs are only one degree beyond that at which they would exclude the daughters as heirs. The second objection has more force. Can the plaintiffs sue in presence of the daughters, who would if the inheritance fell in now succeed before them? The *riwaj-i-am* of this *tahsil* is important as showing that there was no limit to the degree of collaterals who would come in before a daughter, but that at the date of *riwaj-i-am* it was agreed that collaterals beyond the 5th degree should be excluded. After the daughters the plaintiffs would stand next. No doubt even then, in the absence of special circumstances, the plaintiff could not sue (see *Wishan Das v. Thakur Das* 119 P. R. 1901⁽¹⁾). We think, however, that in this case there are special circumstances, which take the case out of the ordinary category. It is highly improbable that the daughters would interpose to contest the alienation by their mother, with whom two of them were living until they married, and one is still living. It is by no means certain that the daughters will ever succeed as heirs. There are several collaterals of the 5th and lesser degrees who would come in before them, though some of these may have lost their right to object by consenting to the sale. If the plaintiffs can sue in the presence of the nearer reversioners, we think they ought to be allowed to sue also in presence of the daughters, who, after all, stand on much the same footing. As to the merits of the case there is very little doubt. In 1896 *Mussammatt Bakhtawar* began borrowing, though apparently there was no need whatever to do so. Certainly there was no need to borrow in the reckless fashion in which she appears to have proceeded. Though left in possession of a good estate, in four years she had made away with it entirely for total sum of Rs. 3,000. Of this large amount only two items can, we think, be regarded as borrowed for necessity. In 1897 *Mussammatt Bakhtawar* mortgaged the land for Rs. 600. This was to meet the expenses of the family litigation, and may fairly be allowed. Later on she married one of her daughters, and pretends to have borrowed over Rs. 900 for the purpose. That is altogether extravagant. But we see no reason why a fair sum, say Rs. 200, should not be allowed on this head. It may be that she would not have enough ready money, especially after the litigation, to defray the marriage expenses. With these exceptions we agree with the Court below in holding that the borrowing was not proved to be for necessity and cannot affect the plaintiffs' rights.

The appeal will be accepted in part, and the decree varied to that extent, namely, that it be declared that the alienation by *Mussammatt Bakhtawar* of the land in question shall not affect the reversionary rights

(1) 6 P. L. R., 1902.

of plaintiffs therein, except as to the sum of Rs. 600, due on the mortgage of 3rd March 1897, and a sum of Rs. 200, now allowed as rightly borrowed for marriage expenses. In other respects the appeal fails. Parties to bear their own costs of this appeal.

Appeal allowed.

APPELLATE SIDE.

No. 167.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Chevis.

RADHO,—(PLAINTIFF),—APPELLANT,

versus

HARNAMAN,—(DEFENDANT),—RESPONDENT.

CASE No. 1096 OF 1906.

Custom—Hindu Law—Succession—Daughter—Brother—Burden of proof—Aroras of Amritsar City.

Where a person sets up a custom governing high caste Hindus contrary to Hindu Law the *onus* lies on him heavily to prove the custom.

Held, that Aroras of Amritsar who were high caste Hindus were governed by Hindu Law, and a custom at variance with Hindu Law in favour of collaterals and against the right of daughter to succeed was not shown to exist by the party setting up the custom.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 5th April 1906.

Mr. Turner, Advocate, for Appellant.

Mr. Roshan Lal, Advocate, for Respondent.

JUDGMENT.

ROBERTSON, J.—(31st May 1907).—The parties to this suit are Aroras of the Amritsar City. The plaintiff is the daughter of one Nathu Mal, Arora, and claims to succeed to his property after the death of his widow. The defendant is a half brother of Nathu Mal, who is in possession of Nathu Mal's property. It is a curious fact that Nathu Mal also had two brothers of the full blood, and two brothers of the half blood, but only one, Harnaman, of the half brothers is a party to this suit. The position of the two full brothers and the remaining half brother Sant Ram has been in no way explained.

The Aroras claim to be, and are admittedly, high caste Hindus. Probably it would be a safe description to say that they are high caste without being very high caste. But it is fully admitted, nay, claimed by both parties that the Aroras are governed by Hindu Law.

Such being the case it is quite clear that if no evidence were offered by either party, the claim must be decreed at once, as under Hindu Law the family not being joint a daughter excludes her father's brother. The defendants, however, set up a custom in entire opposition to Hindu Law and alleged the existence of a custom among the Aroras of the Amritsar City, whereby daughters are excluded from succession. Now it is quite clear that the *onus* of proving the existence of this custom lay heavily on the person or the defendant who asserts its existence (*Rama Nand v. Surgiani*, *I. L. R.*, *XVI All.*, 221, *Maharaj Narain v. Banoji*, 34 *P. R.*, 1907, at page 147) and what we have to see is simply whether or not the custom set up has been proved to obtain among the Aroras, high caste Hindus, in an ancient city like Amritsar, in direct contravention of the personal law of the parties. It has been sought to establish the custom by reference to published rulings of this Court referring to Aroras of other parts of country, and by oral evidence.

It cannot be accepted as an axiom that the Aroras of Amritsar are bound by custom found to obtain in other parts of the country, but rulings of this Court on the question of the custom obtaining among Aroras in other parts may be usefully examined and may in some cases be relevant. We will first consider the rulings before proceeding to deal with the oral evidence.

The first case quoted is that of *Mussammatt Lacho Bai and others v. Asa Nand and others* 144 *P. R.*, 1882. This was a suit by certain collaterals, Aroras of Multan, to contest an alienation by a widow. One of the contentions was that the plaintiff had no *locus standi* in presence of a daughter and daughter's son. The case does not help us at all, both sides alleged that they were governed by custom and no mention was made of Hindu Law, and all that was decided was that the position of the plaintiff justified them in maintaining a declaratory suit.

The judges were careful to say "It seems enough to decide "that the plaintiff is not proved not to be the next reversioner, without "attempting to decide finally whether daughters son are by custom "excluded from the succession". They were also careful to point out that the presence of a daughter, who takes only on a life tenure, even if entitled to succeed, would have been no bar to the plaintiff's suit (see pages 425, 426). The next case is that of *Mokanda v. Balli Singh* 85 *P. R.*, 1884. In that case the parties were Aroras living in Amritsar, but stated to be of Multan origin. This case also is of little use to us. The parties represented themselves as being bound by the custom

of the Multan Aroras. Neither side appeared to have alleged that they were bound by Hindu Law, and the *onus* of proving that a daughter's son could succeed was thrown on the daughter's son, it being accepted that there was a general custom to the contrary. This judgment therefore is of little assistance to us. We next come to the case of *Pitambar and Mussammat Ganesh Bai v. Ganesha Ram* 148 P.R., 1890. The parties to that suit were Aroras of the Dera Ismail Khan, District. In that case it was held that by custom nephews excluded daughters from inheritance. Hindu Law was left on one side, and the effect of *Lacho Bai v. Asa Nand* 144 P. R., 1882 was somewhat misquoted. But attached to that ruling at page 477 of the Punjab Record of 1890, is an exceedingly careful and well reasoned judgment No. 1422 of 1887 (*Nihal Chand v. Premi Bai* 148 P. R., 1890, *note*), in which it was held that there being no custom proved to the exclusion of daughters, daughters were entitled to succeed, a method of viewing the question which we venture to consider the correct one. In *Anant Ram v. Hukama Mal* 62 P. R., 1902⁽¹⁾ this principle was followed. The parties to that case were Aroras of Kasur town, and the *onus* of proving that brothers excluded daughters was correctly thrown upon the plaintiffs, the brothers who asserted it. No doubt the case of *Nihal Chand v. Premi Bai* 148 P. R., 1890 *note*, just alluded to was misunderstood to be in favour of the alleged custom, whereas it is infact against it, but the final result was that a Division Bench found that among Aroras of Kasur daughters are excluded from succession by nephews. This case is of value to the defendants, no doubt, as Kasur is in the next district to Amritsar. It of course proceeded upon the evidence adduced in that case and there appear to have been six instances quoted in support of the custom set up.

It will be seen that of two decisions in which the investigation was approached in the manner which it should be according to the principles of *Daya Ram v. Soheli Singh* 110 P. R., 1906⁽²⁾, *F. B. Nihal Chand v. Premi Bai* 148 P.R., 1890, *note*, was in favour of the succession of daughters, the other *Anant Ram v. Hukama Mal* 62 P.R., 1902⁽¹⁾ was against their claim. The other rulings are of much less value, as it was either assumed that custom of some kind must obtain, or, as in *Lacho Bai v. Asa Nand* 144 P. R., 1882. This point was not really decided. On the other hand Mr. Turner quoted *Mulo v. Phulo Missar* 108 P. R., 1888, *Ami Chand v. Ghasita Mal* 143 P. R., 1882,

(1) S. C., 102 P. L. R., 1902.

(2) S. C., 31 P. L. R., 1907. (F. B.)

and *Lakhmi Das v. Kishen Das* 9 P. R., 1884, out of numerous rulings referring to high caste Hindus to show that among such high caste Hindus of cities daughters succeed in preference to collaterals, as of course they would among any really high caste Hindus under Hindu Law. Both parties to this suit are Aroras and claim to be high caste Hindus under Hindu Law in general, otherwise it might possibly be said that they are not really of sufficiently high caste to follow Hindu Law in the matter of daughter's succession. We now come to the direct evidence put forward by the defendant in support of the custom put forward by him. He has produced a number of Arora witnesses to say that among Aroras of Amritsar collaterals exclude daughters but many of these say also that in matters of inheritance the Aroras are bound by Hindu Law of inheritance. Of all the instances given by them only three at most are in favour of daughters' exclusion by collaterals. In all the other cases there were members of a joint Hindu family who took by survivorship.

We will proceed to examine these three instances.

In the case cited by Jaswant Singh, D. W. 10, a daughter does appear to have been excluded from succession by collaterals.

In a case quoted by Hazara Singh, a little girl aged 10 only was excluded by collaterals. The case quoted by Kalu Singh, D. W. 21, is the strongest in defendant's favour. He says that his own wife was deprived of her father's property by the collaterals, and that it was given up on demand without a suit.

This concludes all the evidence in favour of the exclusion of daughters by collaterals. No judicial decisions among Aroras of Amritsar were put forward. It was, however, contended that no evidence had been given for the defence to which it is replied that the *onus* lay on the defendant and he clearly failed to discharge it, so that it was unnecessary to call any evidence. No doubt this is true, but cases in which daughters had succeeded in the ordinary course under Hindu Law would have been in point.

Four cases were alluded to by Mr. Turner. In one relating to a claim for a succession certificate Miscellaneous Appeal Civil No. 51 of 1890, Divisional Judge, Amritsar, no final decision was come to, but a certificate was granted to the daughter, and as nothing has been shown to the contrary, she probably got the property eventually.

In another case Civil Appeal No. 5870 of 1895, Divisional Judge, Amritsar, it was held not to be proved that a daughter does not

succeed to self acquired property among Aroras of Amritsar. Copies of the judgment in these cases were tendered in this Court for this first time. It may therefore be said that there is no evidence by way of local judicial decision upon the record, Mr. Turner mentioned a more recent case in Amritsar in which the District Judge had held that no custom excluding daughters had been established, but of this we can take notice.

The position, therefore stands thus, the parties are as both sides assert, high caste Hindus. That being so, and they being residents of a large city, it clearly lies heavily upon the party asserting the existence of a custom which contravenes their personal law to prove it. Has the defendant succeeded in doing so?

In considering the points we wish to bear in mind certain observations in previous rulings connected with proof of custom.

In *Chandika Baksh v. Muna Kunwar and others* 1 L. R., XXIV All., 273, their Lordships of the Privy Council remark :—

“The result is that in support of the alleged custom four instances at most can be adduced, and those of comparatively modern date, and that there is no other evidence. It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation.”

The observations in *Muhammad Hussain v. Sultan Ali* 54 P. R., 1903, at page 209 are too long to quote but are much in point in regard to the question before us.

(1) In *Har Narain and others v. Mussammat Deoki and others*, 24 P. R. 1893, learned Judges (Roe and Frizelle) say : “There is no doubt a general tendency of the stronger to override the weak, and many instances may occur of the males of a family depriving females of right to which the latter are legally entitled. Such instances may be followed so generally as to establish a custom even though the origin of the custom was usurpation, but the courts are bound to carefully watch over the rights of the weaker party and to refuse to hold that they have ceased to exist unless a custom against them is most clearly established.

With these views we entirely concur and we should wish to have them weighed and followed by all courts in this province.

Applying the principles indicated above can it be held that the defendant has proved the custom set up by him in deroga-

tion of the Hindu Law which is the personal law of the parties? We do not think it can.

We accordingly accept the appeal and remand the case for decision on the remaining points under section 562, Civil Procedure Code. Stamp on appeal and cross objections to be refunded. Costs to be costs in the cause.

Appeal allowed.

APPELLATE SIDE.

No. 168.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

SHAHAB-UD-DIN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

SOHAN LAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 357 OF 1905.

Muhammadan Law—Will—Bequest for charitable purposes.

A Will executed by a Muhammadan authorising executors “to spend the money for such charitable objects as they think proper, or they shall give it to whomsoever I direct, or use it in such a way after my death that I may obtain eternal bliss”—

Held, that the bequest was invalid, and no effect could be given to it.

First appeal from the decree of Captain B. D. Fitzpatrick, District Judge, Rawalpindi, dated 3rd January 1905.

Bhagat Ishwar Das, Pleader, for Appellants.

Messrs Pestonji Dada Bhai and Fazal Husain, Advocates, for Respondents.

JUDGMENT.

ROBERTSON, J.—(19th December 1906).—One Ghulam Ali made a Will, dated 17th June 1901, which is printed at page 4 of the paper-book as follows :—

(1) My property is as follows :—

(a) Deposit in the shop of Devi Sahai Sohan Lal, Bankers, Rawalpindi Rs. 10,000.

(b) 50 Shares in Commercial Bank, Rawalpindi, valued at Rs. 5,000, and two houses, *pucca* built at Shahjahanpur, together with share of land in Hisam-ud-Din's possession, worth Rs. 2,000.

(2) I have divided the above amount in this way: that after defraying my funeral expenses in a reasonable manner, Rs. 2,000 should be given to each of my wives, that is *Mussammât Maryam Jan* and *Mussammât Sahara*. I have accordingly written to *Devi Sahai Sohan Lal* for making the required entries.

(3) Whereas according to Muhammadan Law, I am entitled to will a third of my property, I give Rs. 500 to my brother's son *Shams-ud-din* on account of his services and for the remaining Rs. 4,500 the following respectable Muhammadans shall be my executors.

1. Khan Bahadur Allah Bakhsh.
2. Moulvi Nazir Ahmad.
3. Moulvi Alaf Din.
4. Babu Abdul Ghani.
5. Sheikh Fazal Ilahi.

These trustees shall expend the money for such charitable objects as they think proper or they shall give it to whomsoever I direct or use it in such a way after my death that I may obtain eternal bliss.

4. *Re* Ornaments.

5. The Rs. 1,000 balance of Rs. 10,000 above with *Sohan Lal*. * * *
I give in equal shares to my three brothers *Shahab-ud-Din*, *Hisam-ud-Din* and *Amir Ali*.

The execution of the Will by *Ghulam Ali* while in full possession of the senses is clearly proved and is now admitted.

The defendants in this case are (1) *Devi Sahai Sohan Lal*, the bankers, (2) the executors trustees named in clause (3) of the Will, and (3) the two widows; the bankers having, in accordance with written instructions from *Ghulam Ali*, written on 17th June 1901 paid over the money to the beneficiaries, the widows and executors in accordance with the terms of their instructions which correspond to the terms of the Will.

The present claimants are three brothers of the deceased *Ghulam Ali*. They urge that the Will is invalid as opposed to Muhammadan Law and that under any circumstances it is invalid as regards clause (3) the bequest of Rs. 4,500 for charitable purposes; that clause being, it is alleged, too vague for execution.

It is admitted that the Will is bad as regards those portions which make bequests to sharers. Consequently if the widows have received more than they are entitled to under Muhammadan Law, i.e., $\frac{1}{2}$ each, of this estate, decree for the balance must be passed against them.

As regards the bankers Devi Sahai Sohan Lal, we think it is quite clear that no action can be sustained against them. They acted simply on the written instructions of their client, dated 17th June 1901, duly signed and filed as exhibit A. That letter is clearly genuine and constitutes a complete answer as regards the bankers, and the appeal is at once dismissed with costs as far as they are concerned.

The real question of difficulty is as regards the "charitable" bequest of Rs. 4,500.

Clause (3) runs—"Whereas according to Muhammadan Law "I am entitled to will a third of my property, I give Rs. 500 to my "brother's son, Shams-ud-Din, on account of his services and for the "remaining Rs. 4,500 the following respectable Muhammadans shall "be my executors.

* * * * *

"These trustees (amins) shall expend the money for such charitable "purposes as they think proper or they shall give it to whomsoever "I direct or use it in such a way after my death that I may obtain "eternal bliss." The bequest of Rs. 500 is not contested.

Now it cannot be contested that the Muhammadan Law permits a very wide scope to a testator as regards the $\frac{1}{3}$ rd of his property which he may dispose of by Will. His power of disposition for expenditure on charitable or religious purposes is subject to very slight restriction.

But here we have a direction to 5 executors whose business it is to realize and distribute the estate to the various claimants and beneficiaries with the least possible delay to dispose of a large sum upon objects which are described in the vaguest way. The words in vernacular are:—"Yih amin is rupaiye ko mussaraf khair men jis tarah woh munasib tassawar kurenge ya jisko main dilaun ya mere bad aise kam men jis se mujh ko sawab-i-daim ho kharch karenge. These trustees (amins) shall expend the money for such charitable objects as they think proper or they shall give it to whomsoever I direct or use it in such a way after my death that I may obtain eternal bliss."

Now a definite bequest in those terms, or even a clear creation of a trust in those terms, would not be invalid up to the prescribed limit according to Muhammadan Law. The money is to be expended on "charitable objects." Such charitable objects to be selected by five respectable persons specially named for that purpose. No authority was quoted to us to the effect that a bequest, or a trust for charitable "purposes" when a certain person is, or persons are, named to select the charitable objects is in itself necessarily bad under Muhammadan Law. What is contended is that under general principles applying to all testators alike such a provision in a Will directing executors to dispose of money on such charitable objects as they may select is bad for indefiniteness and that in such a case it must be held that the money so disposed of must be held not to have been disposed of at all by the Will. In this case although in the second part of the sentence the word "*Amin*" is used it is clear that the five persons named are appointed as executors of the Will in regard to this Rs. 4,500, and that it is as executors that they are to carry out the charitable provisions.

Some of the authorities, *viz.*, *Amir Ali's Muhammadan Law*, Volume I, page 482, *Bai Bapi v. Jumnadas Hathisang* (I. L. R., XXII Bom., 774), *Runchor Das Vandravandas v. Parvatibai* (I. L. R., XXIII Bom., 725), *Smith v. Massey* (I. L. R., XXX Bom., 500), *In re Jarman's Estate* (L. R., 8 Ch. Dn. 587) and *Parbathi Bibee v. Ram Barun Upodhya* (I. L. R., XXXI Cal., 895), quoted to us on either side were in point, some were not for various reasons. As regards the English authorities, *Morice v. The Bishop of Durham* (9 Ves., 399; 10 Ves., 522), is not exactly in point. There a trust had been created "to dispose of the ultimate residue on such objects of benevolence and liberality as the Bishop of Durham shall most approve", and this was held to be bad as not being a charitable trust pure and simple, and as not being capable of proper supervision for various reasons more or less peculiar to the English Law. The principles laid down in *re Jarman's Estate Leavers v. Clayton* (L. R., 8 Ch., Dn., 584), however, are of more general application. One William Jarman had made the following provision in his Will, "I direct that my executors shall apply to any charitable or benevolent purpose they may agree upon, and at any time, the

residue of my personal property which by law may be applied to charitable purposes."

The executors accordingly gave the money to the General Hospital, Nothingam.

The next of kin claimed the residuary estate on the ground that it was "undisposed of." In delivering judgment Vice-Chancellor Hall said: "I must hold that in this case the direction has reference to a gift or trust which the court can not execute. It could not execute it at the date of the death of the testator nor if the executors had not thought fit to exercise the discretion which was vested in them. The observations in the cases show that the test is this, that the court is not to wait and see whether the executors will appoint to charitable objects or not, but to look at the Will as at the date of the death of the testator and at once say whether the gift is definite, or indefinite, and if the latter, that it is inoperative. That is the case here and I hold that the gift of the residue fails."

In that case the residue had been actually allotted to a clearly charitable object; in the case before us it is admitted that no part of the money has as yet been devoted to any charitable object. In *Runchordas Vendrahan Das and others v. Parvatibai and others* (I. L. R., XXIII Bom., 725), a bequest of the residue of the estate for "dharma" by a Hindu was held to be void for uncertainty, *Marice v. The Bishop of Durham*, being followed. In this case the words in vernacular are:—"Yih amin is rupaiye ko mussaraf khair men jis tarah woh munasib tassawar karenge, yah jis ko main dilaun ya mere bad aise kam men jis se mujh ko sawab-i-daim ho kharch karenge."

We are of opinion, following the principles laid down by the House of Lords and followed by their Lordships of the Privy Council, that this provision of the will must be held to be inoperative and void on account of uncertainty, and that the Rs. 4,500 disposed of thereby must be held to be undisposed of and to be the property of the heirs.

The appeal will therefore be so far accepted as against the executors as to decree Rs. 4,200 to the plaintiffs. The Rs. 300 expended on funeral obsequies must of course be allowed. As the executors apparently acted in perfect good faith they will not be liable for costs.

Appeal allowed.

APPELLATE SIDE.

No. 169.

CIVIL.

Before Mr. Justice Rattigan.

GURDITTA,—(DEFENDANT),—APPELLANT,

versus

NARAIN DAS,—(PLAINTIFF),—RESPONDENT.

CASE No. 949 OF 1906.

Civil Procedure Code (Act XIV of 1882), Sections 102 and 103—Dismissal for default—Mortgage—Redemption suit—Fresh suit barred.

When a suit for redemption of a mortgage is dismissed under section 102 of the Civil Procedure Code for default in prosecution, and the order of dismissal has become final, a fresh suit for redemption is barred.

*Further appeal from the order of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 11th July 1906.
Rai Bhadur Bakhshi Sohan Lal, Pleader, for Appellant.*

JUDGMENT.

RATTIGAN, J.—(5th January, 1907).—On the 20th March 1896 present plaintiff sued present defendant for redemption of a certain house on payment of Rs. 40. This suit was dismissed in default under section 102, Civil Procedure Code, on the 8th March 1897.

On the 14th December 1905, plaintiff instituted the present suit for redemption of the said house on payment of the said sum of Rs. 40. This suit was dismissed by the Munsif, 1st class, as barred by the provisions of section 103, Civil Procedure Code, but this decision was reversed on appeal by the Divisional Judge, who held that “the present and the former cause of action are different, for a mortgagor can at any time claim redemption.” The case was accordingly remanded under section 562, Civil Procedure Code, for decision on the merits.

Defendant has appealed to this Court, and I have heard his learned pleader and plaintiff (who appeared in person) in support of their respective cases.

The allegations in the present plaint are identical with those set out in the previous plaint, with the exception that in paragraph 4 of the present plaint, the plaintiff alleges that within four months of suit he requested defendant to accept the sum of Rs. 40. and give up the house, and that defendant has refused to comply with this demand. I do not consider this addition as material or as, in any respect,

altering the cause of action which is the denial of plaintiff's alleged right to redeem the property. With the exception, however, of this addition, the allegations in the two plaints and the reliefs sought in the former and the present suit are, as I have said, absolutely the same. The question, then, is whether the Divisional Judge's view is correct that the dismissal of the former suit under Section 102, Civil Procedure Code, is no bar, under Section 103 of the Code, to the present suit because a mortgagor can at any time claim redemption. For this very sweeping statement of the law I can find no authority, nor does the learned Judge refer to any. On the other hand, the terms of Section 103 are clear :—" When a suit is wholly or partially dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action." If, then, a mortgagor sues for redemption and his suit is dismissed under section 102, and he thereafter brings a fresh suit for redemption of the same mortgage, is the cause of action in the second suit the same as, or different from, the cause of action in the first suit ? To this question there can be only one answer, for the very question has been decided by their Lordships of the Privy Council in *Shankar Baksh v. Daya Shankar I.L.R., XV Cal. 422*. The head-note to this report runs as follows :—

" To a suit brought in 1883 for redemption of a mortgage made in 1853 villages in Oudh subsequently included in the mortgagee's *talukdari* estate and *sanad*, the defence was that the mortgagor having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortgagee having appeared to defend against the plaintiff under section 114 of Act VIII of 1859. Held, that, although the plaintiff, who had claimed in the prior suit the under-proprietary right in virtue of a sub-settlement, the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action which was, in both cases, the refusal of the right to redeem, and that under section 114 of the Act, the judgment of 1864 was final." Their Lordships at the conclusion of their judgment remark : " Various questions have been raised and very fully argued before their Lordships in order to show that the cause of action in the two suits is not the same, and that the present suit is for a new cause of action. Their Lordships have fully considered those arguments, and they are unable to come to the conclusion

that the causes of action are not the same and that the judgment of the Additional Judicial Commissioner, who held that the suit was barred under the provisions of Section 44, is wrong." This decision was followed by this Court in *Mam Raj v. Chandwa Mal*, 117 P. R. 1891. In this case one Budhu, the original mortgagor, appears to have brought a suit in 1884 for redemption of the mortgage, but his suit was dismissed under section 102 of the Civil Procedure Code. Subsequently the heirs of Budhu sued for redemption of the same mortgage, and this Court held that the second suit (though brought not by the original plaintiff but by his representatives) was not maintainable, being barred by the provisions of section 103 of the Code also *Cf. Imdad Ali v. Hurmat Ali*, 32 P. R., 1905.⁽¹⁾ Plaintiff has referred me to several cases but they do not in any way support the contention that the present suit is maintainable. In *Ram Chandra Jiwaji's case I. L. R., X Bom.*, 28, the facts were entirely different. To quote from the judgment:—"In the first suit against the second defendant alone, plaintiff alleged that he was the owner of the equity of redemption by purchase from the first defendant and, as such, was entitled to redeem the second defendant's mortgage. In this suit his case is that he contracted for the purchase of the property from the first defendant, the latter undertaking to clear it of the second defendant's mortgage; that the second defendant has since purchased the equity of redemption from the first defendant with full knowledge of the said contract, and he substantially, though not in strict form, seeks that both the defendants may be compelled to specifically perform the contract. Under these circumstances we do not think that Section 103 precludes plaintiff from bringing his present suit." Here clearly the two causes of action were in no sense identical. The plaintiff has cited a large number of authorities *Shibbu Mal v. Paira Singh* 86 P. R. 1877, *Nathu Singh v. Rura* 14 P. R. 1881, *Samiachari v. Soma Sundra I. L. R., VI Mad.*, 119, *Perimachari v. Angappa I. L. R., VII Mad.* 423, *Muhammad Shami-ud-Din Khan v. Mannu Lal I. L. R., XI All.*, 386, *Ramani v. Brahma Dattan I. L. R., XV Mad.*, 366, which lay down the proposition that when a suit for redemption has been instituted and a decree has been passed for redemption but not executed a subsequent suit for redemption of the same mortgage is maintainable. It is a question whether this is a correct proposition and there are an equal number of authorities which decide that in such cases a subsequent suit is not maintainable. *Vide Vedapuratti v. Vallabha Valiya Raja I. L. R. XXV*

(1) s. c., 39 P. L. R., 1905.

Mad., 300 F.B. *Gan Savant Bal Savant v. Narayan Dhond Savant I.L.R.*, VII Bom. 467; *Maloji v. Sagaji*, I. L. R., XIII Bom. 567; *David Hay v. Razi-ud-din* I. L. R. XIX All., 202. As observed by Sir A. White, C. J., in the Vedapuratti's case at page 307), the right to redeem might be a subsisting right until it is duly foreclosed, but it does not follow that it is enforceable by a second redemption suit. But whether the principle laid down in *Shibbu Mal v. Paira Singh*, 86 P. R., 1877, and the other cases relied upon by plaintiff is correct or not, it is obvious that these authorities are not in point in the present instance, whereas the two cases referred to on behalf of appellant are direct authorities for holding that the present suit is barred by the provisions of Section 103, Civil Procedure Code. I therefore accept the appeal and, reversing the order of the lower Appellate Court, dismiss the suit with costs throughout.

Appeal allowed.

APPELLATE SIDE.

No. 170.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

MUHAMMAD DIN,—(DEFENDANT),—APPELLANT,

versus

JAWAHIR AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 516 OF 1906.

Custom—Adoption—Daughter's son—Sekhu Jats of Daska Tahsil, Sialkote District—Burden of proof.

Held, that the defendant, on whom the onus lay, had failed to prove that among *Sekhu Jats* of *Daska Tahsil*, *Sialkote District*, to which tribe the parties belonged, adoption of a daughter's son by a sonless proprietor was valid by custom in the presence of near collaterals

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 8th June 1905.

Bakhshi Gokal Chand, Advocate, for Appellant.

Chaudhri Shahab-ud-din, Pleader, for Respondents.

JUDGMENT.

SHAH DIN, J.—(15th March 1907.)—One Wadhaya, a *Sekhu Jat* of *Mausa Chak Khina* in the *Daska Tahsil* of the *Sialkot District*, adopted his daughter's son in February 1904, and executed a registered deed of adoption in his favour. The plaintiffs, who are very near

relations, that is, the first cousins and sons of first cousins of Wadhaya, brought the suit out of which this appeal has arisen for a declaration that the adoption in question was invalid by custom. Both the lower Courts have found, after a consideration of the relevant clauses of the *Riwaj-i-ams* of 1855 and 1893 and upon an examination of the instances relied upon by the parties that the defendants, upon whom the *onus* lay, have failed to prove that the adoption was valid by custom. They have consequently decreed the claim.

The adopted son appeals to this Court; and the question for decision in this appeal is whether, among Sekhu Jats of *Tahsil Daska*, custom empowers a sonless proprietor to adopt his daughter's son. The *onus* of proving the validity of the alleged adoption lies admittedly on the appellant, and we have to see whether, upon the evidence adduced by him, he has succeeded in discharging the *onus*. After giving our best consideration to the argument of the appellant's counsel and referring to the record, we think that he has not done so.

The answer to question 19 in the old *Riwaj-i-am* of 1865 is to the effect that in the absence of sons a brother's son, and in his absence a daughter's or a sister's son, can be adopted. No instances are given in support of this entry. The *Riwaj-i-am* of 1893 is opposed to this, as all the tribes of the *Daska Tahsil* (in which the parties to this case reside) state therein that it is only in *default of collaterals* that a daughter's son can be adopted (see Customary Law of the *Sialkot District*, page 22, answer to question 71). There being thus a conflict between the two *Riwaj-i-ams*, the appellant cannot rely upon the entry in the earlier *Riwaj-i-am* as serving to shift the *onus* of proof on to the plaintiffs.

The oral evidence in the case is of no value. The Office Kanungo, who was appointed a local Commissioner to make an enquiry into the question of custom on the spot, mentions, in his report, two old instances culled from the Settlement pedigrees of the villages concerned, namely. (1) In *Mausah Sahuwala*, in which one Sher Muhammad gifted his property to his daughter's son, Jalal, and (2) in *Mausah Bhopanwala*, in which Dulla, a Chima Jat, adopted his sister's son, Ditta. The judicial decisions relied upon by the appellant are as follows :—

(1) *Fakir v. Ram Ditta*, decided on 29th July 1888. This is of no value, as the suit was held to be barred by limitation and there was no decision on the question of custom involved.

(2) *Sher Singh v. Dassan*, decided in 1871. In this case the nephews of the donor contested a gift of 3rd of his property to a daughter's son, who had also been adopted. The suit was dismissed and there was no appeal. The parties were Jima Jats of the Sialkot *Tahsil* and the question of the validity of the adoption does not seem to have been properly considered.

(3) *Chanda v. Karam Dad*, decided by the Divisional Judge, Sialkot, on 25th January 1895. The parties were Chima Jats of *Tahsil* Daska. The alienation in dispute was made by one Buta, who executed a registered Will in favour of his sister's son who was also his son-in-law, and had apparently been adopted by him. The plaintiffs were nephews of Buta. The Divisional Judge held that the defendant had been living with Buta as his *khanadamad*, and that his adoption was valid by custom.

(4) *Mula v. Arura*, decided by the Divisional Judge, Sialkot, on 17th April 1895. The parties were Bajwa Jats of *Tahsil* Sialkot, and the question for decision was whether the adoption of a sister's son was valid by custom.

The Divisional Judge upheld the adoption, but his decision was reversed on appeal by this Court, on the ground that no adoption had in fact taken place.

(5) *Muhammad Bakhsh v. Ditta*, decided in 1880. The parties were Sandhu Jats of *Tahsil* Sialkot. The case was one of gift and not of adoption. The judgment, of which a copy is placed on the file, does not fully state the facts of the case nor does it properly discuss the question of custom involved. The plaintiffs rely upon the following precedents :—

(a) *Ishar v. Devia*, decided on 1st June, 1904. The parties were Jats resident in *Tahsil* Daska. The Court held that the adoption of a daughter's son was invalid by custom in the presence of nephews.

(b) *Nanda v. Nanak*, decided on 31st May 1900. The parties were Jats of *Tahsil* Sialkot. The adoption of a sister's son was held invalid in the presence of a nephew.

(c) *Hari Singh v. Hira Singh* decided on 2nd January 1877. The parties were Jats of *Tahsil Daska*. The adoption of a daughter's son was held invalid in the presence of a nephew.

(d) *Hira v. Ditta*, decided on 20th April 1904. Parties were Jats of *Tahsil Sialkot*. The adoption of a sister's son was held invalid in the presence of collaterals of the adoptive father.

Coming now to the published decisions of this Court, we find that *Ganpat v. Nanak Singh* 81 *P. R.*, 1900; and *Nanak v. Nandu*, 29 *P. R.*, 1904⁽¹⁾ support the plaintiffs' contention. In *Ganpat v. Nanak Singh* it was held, after considering the entries in the *Rivaj-i-ams* of 1865 and 1893 bearing upon the question of custom, that among Kalwan Jats of the Sialkot District the adoption of a daughter's son was invalid by custom. In *Nanak v. Nandu* it was held that among Ghumman Jats of the Sialkot District the adoption of a sister's son is invalid in the presence of a cousin.

On the other hand, the appellant's counsel is unable to cite a single decision of this Court in favour of the validity of the adoption set up in this case.

On the whole, then, after a careful consideration of the evidence and the materials before us, we cannot but hold that the appellant, upon whom the *onus* lay of proving affirmatively that his adoption was valid by custom, has failed to discharge that *onus*.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

(1) s. c., 143 *P. L. R.*, 1904.

FULL BENCH.

REVISION SIDE.

No. 171.

CIVIL.

*Before Sir William Clark, Kt. Chief Judge,
Mr. Justice Robertson and
Mr. Justice Kensington.*

GAMUN AND OTHERS,—(PLAINTIFFS),—PETITIONERS,
versus

KARIM KHAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No 1809 OF 1907.

Jurisdiction of Civil and Revenue Courts—Punjab Tenancy Act (XVI of 1887) section 77 (3) (j)—Landlord and Tenant—Occupancy tenant—Haq bua—(Door tax)—Declaratory suit by occupancy tenant denying liability.

Held, by the Full Bench, that a suit for a declaration that the plaintiffs, who are occupancy tenants, resident in a village are not liable to pay 'door tax' (Haq bua) is cognizable by the Revenue Court and not by the Civil Court.

Petition for revision of the order of H. Scott Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 23rd April, 1907.

Mr. Nanak Chand, Advocate for Petitioners.

Mr. Shah Nawaz, Advocate for Respondents.

ROBERTSON, J.—(22nd February 1908)—The suit in this case as laid is a claim for a declaration that the plaintiffs, who are occupancy tenants resident in Mauza Shin Bagh, are not liable to pay "door-tax"—*haq bua* to the defendants who are the proprietors of the village. The question referred to the Full Bench is :—

Is this suit triable by a Revenue or by a Civil Court?

In a suit between the same parties, or some of them, some of the proprietors sued for a declaration that they had a right to levy *haq bua* at a certain rate from the present plaintiffs, and that suit was held by a Bench of this Court to be triable by a Revenue Court. The judgment has been printed as an addendum to *Raj Sarup v. Hardawari* 95 P. R. 1907.

It is contended that the jurisdiction of the Civil Courts in this case is ousted by the third clause of section 77 of the Tenancy Act, and sub-clause (j), clause (3), of section 77 runs as follows :—

"The following suits shall be instituted in and heard and determined by Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted."

Sub-clause (j) runs :—

“Suits for sums payable on account of village cesses or village expenses.”

It is not contested that *haq bua* comes within the term village cess.

Now it is quite clear that a suit by the landlords claiming a definite sum on the allegations that *haq bua* was payable by the defendants, and was due by them, would be triable by a Revenue Court. In such a suit the question whether *haq bua* was leviable at all in the village could be tried and determined by the Revenue Court, and a suit brought in this form would be triable solely and exclusively by a Revenue Court, which, as has been clearly laid down by this Court, would have power to go into all questions and decide all issues necessary to the decision on the claim. Suits by the landlords for a declaration that such dues were leviable, without alleging any sum to be due and recoverable at the moment would clearly be a suit regarding the same dispute and matter, differing only from a claim to money actually due on the same grounds in form and not in substance; and the same can be said, when the suit is brought by the persons from whom the claim is made, to the effect that they are not liable. Liability for the payment of a cess alleged to exist in the village is the subject matter of the dispute, and the dispute or matter is one in regard to which a suit could be brought under section 77 (3), (j). We think that a suit like the present for a declaration is of the same nature as a reply to a suit under section 77 (j), which suit is clearly triable by a Revenue Court; and the mere fact that the form of the suit is one for a declaration that the cess is not payable, instead of an assertion that a definite sum is payable, by way of cess, does not alter its character, or give the Civil Courts jurisdiction, when the dispute or matter itself is clearly one as to which a suit could be brought under section 77 (3) (j). We think, therefore, that the suit before us is triable by a Revenue Court. This view is supported by the judgments of this Court in *Bahadur Khan v. Sardar* 89 P. R. 1895 *Sheikh Muhammad v. Habib Khan* 67 P. R. 1905, (1) *Raj Sarup v. Hardawari* 95 P. R. 1907.

It is, however, contended that a different view is taken in *Sheikh Muhammad v. Habib Khan*, 67 P. R. 1905 (1).

Before discussing that ruling, we wish to guard against too wide an

[1] S.C. 113 P.L.R. 1903,

interpretation of the meaning of section 77 (3), and of what is laid down in this judgment.

While we hold that declaratory suits, which clearly differ in form only from suits for money already due and clearly cognizable by a Revenue Court only, or also triable by a Revenue Court, we are very far from laying down that every declaratory suit, in regard to every matter in regard to which some kind of suit can be tried exclusively by a Revenue Court, is also necessarily triable only in a Revenue Court. It has always in every particular case to be shown that the jurisdiction of the Civil Courts, which *prima facie* exists, has been specifically ousted. We find, on examining, the ruling in *Sheikh Muhammad v. Habib Khan* for instance, that the suit there was of a different nature from the one before us. In that suit it was contended that, although certain cesses were payable, the plaintiffs were not themselves liable to payment by reason of not belonging to the classes from which payment could be claimed. That case is, therefore, distinguishable from the present one. Each case must be considered on its own merits, and it may be laid down, as a broad general principle, that the jurisdiction of the Civil Courts is only ousted by section 77 of the Tenancy Act in regard to such classes of cases as are clearly actually covered by the precise terms of one or other of the clauses of that section, or which are clearly in substance identical with the clauses covered by the clauses of that section, though differing in form.

We are of opinion that the suit now before us was triable by a Revenue Court, and the application for revision stands dismissed with costs accordingly.

Application dismissed.

REVISION SIDE.

No. 172.

CIVIL.

Before Sir William Clark, Kt. Chief Judge.

FATTA,—(PLAINTIFF),—PETITIONER,

versus

KHAN BAHADUR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 1652 OF 1907.

Suits Valuation Act VII (of 1887) section 3—Jurisdiction of Civil Court—Valuation of suit—Pre-emption suit—Suit for possession of land assessed with land revenue—Definite portion of revenue paying khata.

Held, that the value for purposes of jurisdiction of a suit for possession of land assessed with revenue where the land claimed is a definite portion

of a revenue paying *khata*, is thirty times such portion of the revenue as may be rateably payable in respect of that portion.

Petition for revision of the decree of C. H. Atkins, Esquire, Divisional Judge, Ferozepore Division, dated 8th April 1907.

Pandit Sheo Narain, Pleader for Petitioner.

Mr. Harris, Pleader for Respondents.

JUDGMENT.

CLARK, C. J.—(24th February 1908).—The facts of this case are briefly these.

The first Court was a Munsif, 1st class, with jurisdiction to try suits up to the value of Rs. 1,000.

This is a pre-emption suit as regards 672 *kanals* out of a *khata* of 1,610 *kanals*. The *khata* being separately assessed to revenue—thirty times the revenue assessed on the whole *khata* being Rs. 766.

The market value of the land in suit is Rs. 6,000. The Munsif held that, according to *I. L. R. XVI All.*, 493, the Court-fee should be levied on the market value, and that the suit was beyond his jurisdiction, and returned the plaint for presentation in a Court of competent jurisdiction. The Divisional Judge in appeal held that the Munsiff had no jurisdiction and had rightly returned the plaint, but that its decision as regards Court-fee was *ultra vires*, and dismissed the appeal.

Plaintiff has applied to this Court on the revision side.

Rule I made under Section 3 of the Suits Valuation Act must determine the value for jurisdiction in this case and if clause (b) is applicable then clause (d) making the market-value the criterion for jurisdiction does not apply.

Clause (b) here is different from clause (b) V, Section 7, of the Court-Fees Act.

To the former an explanation and illustrations have been added.

The explanation speaks of a "portion of part of an estate," and says that in a suit for such portion the value for purposes of jurisdiction shall be thirty times such portion of the revenue of the part as may be rateably payable in respect of that part.

Illustration 2 says that in a suit for one *ghumao* out of 10 *ghumaos*, the 10 *ghumaos* being separately assessed to revenue of Rs. 20 then the value of the 1 *ghumao* for purposes of jurisdiction is one tenth of thirty times Rs. 20.

This is exactly a similar case to the present ; and the value for the purposes of jurisdiction in this case is $\frac{672}{1610}$ of thirty times the re-

venue assessed on the 1,610 *kanals*. The Allahabad judgment quoted above relies upon a rule made in the N. W. Provinces different from our rule, and the difference in the rule made in this Province was apparently intended to meet a case like the present.

The Court, therefore, has jurisdiction so far as the Suits Valuation Act is concerned.

However, a recent Full Bench ruling of this Court, *Muhammad Afzal Khan v. Nand Lal* 16 P. R., 1908, F.B., ⁽¹⁾ decides that a Court has no jurisdiction to pass a decree for pre-emption where the sum payable exceeds the limits of the Court's pecuniary jurisdiction. Thus, if the Court decides in favour of plaintiff's right of pre-emption, it would not have power to pass a decree, the value of the property being admittedly over Rs. 5,000.

I accept the revision so far as to hold that at the present stage the First Court had jurisdiction to try the case; but I direct that the case be heard by the District Judge.

I set aside the order of the First Court as to the proper Court-fee payable in this case, and leave this question to be decided by the District Judge. This will have to be determined on the construction of section 7, V (b), of the Court Fees Act, which, as noted above, differs from the corresponding rule in the Suits Valuation Act.

The parties will bear their own costs of this revision.

Petition accepted.

REVISION SIDE.

No. 173.

CIVIL.

Before Mr. Justice Rattigan.

GULLA SINGH,—(PLAINTIFF),—PETITIONER,

versus

SUNDER SINGH AND ANOTHER,—(DEFENDANTS)—RESPONDENTS.

CASE NO. 1721 OF 1907.

Punjab Courts Act (XVIII of 1884, as amended), Section 70 (1) (a)—Revision—Civil cases—Material irregularity—Ignoring the effect of document—Wrong interpretation of document.

Held, that though a wrong interpretation of a document does not amount to a material irregularity within the meaning of Section 70(1) (a) of the Punjab Courts

(1) S. C., 146 P. L. R., 1908.

Act justifying interference in revision by the Chief Court, yet where the lower Court has completely ignored the terms of a document or has placed on them a perversely erroneous construction, the Chief Court is fully justified in revising the judgment of the lower Court.

Petition under section 70 clause (a) of Act XXV of 1899 for revision of the order of Divisional Judge, Amritsar, dated 16th March 1907.

Mr. Moti Lal, Pleader, for Petitioners.

Rai Bahadur Lall Chand, Advocate, for Respondents.

JUDGMENT.

RATTIGAN J.—(8th April 1908).—Mr. Lal Chand raises a preliminary objection that there is in this case no ground for entertaining an application for revision. Admittedly clause (b) of Section 70 of the Punjab Courts Act, as amended, has no application, and the learned pleader contends that the petition was admitted to a hearing merely on the question as to the proper construction of the two documents relied upon by the plaintiff and that a question of this kind is inadmissible for the purposes of clause (a) of the said section, inasmuch as the fact that a Lower Court has erroneously interpreted a certain document does not amount to a material irregularity. For the appellants Mr. Moti Lal contends that a mere wrong interpretation of a document would not justify interference by this Court on the revision side, and he unreservedly accepts as correct the rulings relied upon by Mr. Lal Chand (*viz.*, Nos. 66 P. R., 1898, 60 P. R., 1891 and 36 P. R., 1899). But, according to Mr. Moti Lal, there is in the present case something far more irregular than a mere erroneous construction of a document. He urges that the Divisional Judge has practically ignored the two documents in question (namely, the *murasla* of 1859 and the *ikrarnama* of the 29th January 1896), and that in any case the interpretation put upon these documents is so obviously wrong that the only inference that can be drawn is that the Divisional Judge did not attempt to apply his judicial mind to a proper understanding of them. Mr. Moti Lal further points out in support of this contention that the Divisional Judge did not seriously attempt to deal properly with this case, that that learned Judge has in one line, and, without assigning any reason whatever, held contrary to the finding of the Court of first instance, that plaintiff's suit has not been proved to be within time.

I have duly considered the arguments of the learned pleaders, and my conclusion is that Mr. Moti Lal has substantially established his contentions. As I have remarked, the plaintiff relies strongly in support of his claim upon : (1) the *mursala* executed by Sardar Mangal Singh in 1859, (2) the *ikrarnama* executed by the *pujaries* and Sardar Gurdit Singh in 1896. The learned Divisional Judge has in the most cursory manner disposed of these two very important documents. As regards the former he observes :—"The *murasla* gives the history of the plot in suit, from which it appears that after the overthrow of the Ramgarhia *Misl* by Maharaja Ranjit Singh, the land in suit was used as an encamping ground by the troopers of the Maharaja. This *murasla* goes to prove that the land in suit was not then in possession of the members of the family of Ramgarhias. It ceased, therefore, to be the joint property of the Ramgarhias." This is a very one-sided construction of this document, and the learned Judge completely ignores the fact that, at the conclusion of the documents, Sardar Mangal Singh admits (and this too in 1859) that Sardar Jodh Singh and Sardar Jassa Singh (the ancestor of plaintiff) was *qua* this property a common ancestor and that the *smadhs* (or cenotaphs) of these and other ancestors existed in the land in question. This part of the document is entirely lost sight of by the Divisional Judge, but it is clearly a most important admission on the part of Sardar Mangal Singh and was made at a time when, according to the defendants, the land in question had already been reclaimed by Sardar Mangal Singh after confiscation by Maharaja Ranjit Singh. In 1859, according to defendants' present contention, the land had really become the separate property of Sardar Mangal Singh and his branch of the family. If so, why this reference to Sardars Jodh Singh and Jassa Singh and their *smadhs*? To this question the Divisional Judge gives no answer, and it is idle to say, in view of the above admission, that the land had ceased to be joint property after its confiscation by the Sikh Government.

But the learned Judge's interpretation of the *ikrarnama* of the 29th January 1896 is still more surprising. This document which, as I have already stated, was executed by the *pujaries* and Sardar Gurdit Singh, provides that the Sardar and the other collaterals of his family (*wa digar mutallikin yak jaddi khandan Sardar sahib mauzuf*) have the right to use the land according to established practice.

The Divisional Judge holds that this agreement does not help the plaintiff's case, because (1) it was not executed in favor of plaintiff or his father, and (2) there is no mention made in it of the fact that the land in suit was owned or occupied or used by the plaintiff or his father. The learned Judge here again does not attempt to explain what he understands by the words *wa digar mutallikin yak jaddi khandan Sardar sahib mausuf*. Obviously, and I might add admittedly, the plaintiff is one of the *yak jaddi khandan* of the Sardar referred to, and the agreement is that the land is to be used by all such according to the established practice.

The inference obviously is that all such *yak jaddis* have the right to use this land according to custom. Mr. Lal Chand, seeing this difficulty, contended that the meaning of the words in their ordinary and literal signification must be wrong because there are other members of the family who do not claim the rights to which plaintiff asserts that he is entitled. He argues that for this reason the usual meaning of the word must not be here accepted. I confess I am unable to follow this argument.

Because some other members of the family may not choose to assert their rights, it does not follow that plaintiff has not the right which according to the plain and ordinary interpretation of the document he admittedly possesses. To my mind to say that the document does not mention the fact that plaintiff or his father owned or occupied or used this land, and that therefore the plaintiff cannot rely upon it, savours of very special pleading. The document in express terms refers only to the Sardar (Gurdit Singh) by name, but it clearly also includes all persons who can claim to be *yak jaddi* of the Sardar's family, and under this designation the plaintiff undoubtedly falls.

I accordingly hold that the Lower Appellate Court has so completely ignored the terms of these two documents, or at all events has placed upon them an interpretation so perversely erroneous, that this Court is fully justified in considering this application on the revision side. The case reported in No. 29 P. R., 1906⁽¹⁾, supports my view.

The next question is whether the petitioner has established a case justifying interference with the order of the Lower Appellate Court. Here again I have no hesitation in agreeing with Mr. Moti Lall. The learned Divisional Judge has reversed the decree of the

(1) S. C., 97 P. L. R., 1906.

first Court upon grounds which, in my opinion, are most inconclusive. He has, as already observed, entirely overlooked (or perversely misconstrued) the two documents upon which the plaintiff relies and on the strength of which the Court of first instance decreed the claim, and he has given four reasons in support of his own conclusions which when considered fail to carry conviction. These grounds are as follows:—

(a) That a slab was put up on the spot with the inscription *Ahata Shamahan Khandan Sardar Mangal Singh Ramgarhia C. S. I.*

The slab was put up some years before suit, and the Divisional Judge is of opinion that if plaintiff or his father had any claim to the land, he or his father should have protested against its being put up. But on what ground Sardar Mangal Singh was in his time the head of the family and by fact the most important member of it? Why then should plaintiff object to the slab?

He belonged to Sardar Mangal Singh's *Khandan* and he might quite reasonably regard the inscription as one as much in his favor as in favor of the direct descendants of the Sardar.

(b) That when the *pujaris* sued Sardar Gurdit Singh with respect to this land, neither plaintiff nor his father took any part in the litigation. Here again the question arises, why should they have interfered? This litigation arose in the following manner.

The *pujaris* apparently demolished a *Smadh* of Partap Singh, a nephew of Sardar Gurdit Singh and the latter threatened them with criminal proceedings. The *pujaris* thereupon executed the *ikrarnama* above referred to in favor of Sardar Gurdit Singh, and the latter in consequence refrained from prosecuting them. Shortly afterwards the *pujaris* in, spite of this *ikrarnama*, brought a civil suit against Sardar Gurdit Singh and claimed that the land belonged to them. Plaintiff was not impleaded as a co-defendant and he very naturally, and not unwisely, allowed the parties to this suit to fight out their dispute which, it must be remembered, really arose with regard to the demolition of Partap Singh's *Smadh*, a matter with which plaintiff had no direct concern.

(c) That defendants have encroached upon part of the land by building a *tavelu*, and plaintiff raised no objection thereto. Mr. Moti Lall asserted (and his assertion was not controverted) that the land actually encroached upon comprised only a few square yards. If so, I do not see how plaintiff's omission to object to this user can reasonably be urged as an argument in support of the contention

that he has no right to the land. It must also not be forgotten that plaintiff is in Government service and not resident in Amritsar.

(d) That while various members of Sardar Mangal Singh's family who have died have been cremated in the *shamshan* in suit—there is no *smadh* of any member of plaintiff's own branch there subsequently to the death of Sardar Jodh Singh and Jassa Singh. But plaintiff's own father, Sardar Tarbhanga Singh, was admittedly cremated at this spot in 1905, and various members of Sardar Mangal Singh's branch have not been cremated there, nor have their *smadhs* been put up there. The very fact that the *smadh* of Sardar Jassa Singh, plaintiff's ancestor, is admittedly there goes to show (in corroboration of what is stated in Sardar Mangal Singh's *murasla*) that the place was originally intended for the use of the two branches of the family. One of the defendants has, indeed, admitted that the land was original by owned by the two branches of the family jointly. He no doubt adds that it was subsequently acquired by his own branch as separate property, but there is not a tittle of proof of such subsequent separate acquisition and the assertion is directly contrary to Sardar Mangal Singh's practical admission in 1859 that the land was used as a burning plot for members of the joint family.

In my opinion the purely theoretical grounds upon which the Divisional Judge bases his conclusions are *per se* unsound and cannot in any case weigh against the very strong evidence in support of plaintiff's case which is afforded by the two documents so cursorily dismissed from his consideration by the learned Judge. The judgment of the Munsif is in my opinion far more convincing, and it has, I think, been reversed on entirely erroneous and untenable grounds. The Divisional Judge states that he visited the spot, but the plaintiff was absent on the occasion as his official duties prevented him from being present. This personal inspection was therefore of no great value as the defendants doubtless did not go out of their way to bring facts adverse to their case to the notice of the Judge.

Before concluding, I must say a few words about the finding of the Divisional Judge that the present claim is barred by time. The learned Judge does not attempt to discuss this question. He gives no reasons whatever for his finding, nor does he state under what article of the Limitation Act the claim is barred. He casually observes at the end of his judgment that it is not proved that the plaintiff's claim is within limitation. The first Court found upon the facts,

and gave reasons for its conclusion, that the suit was within time, and it is surprising to find a judicial officer of experience dismissing a question of this importance in so perfunctory a manner. The point having been decided by the first Court in plaintiff's favor, the Lower Appellate Court was bound, if it disagreed, to give reasons for holding otherwise. But in this, as in other respects, the Divisional Judge has, in my opinion, failed to show that appreciation of his duties which a litigant is entitled to expect of a superior court of law.

I accept the petition for revision, and reversing the decree of the Lower Appellate Court, I restore that of the Court of first instance. Respondents must pay costs throughout.

Petition accepted.

APPELLATE SIDE.

No. 174.

CIVIL.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

MAHMUD,—(PLAINTIFF),—APPELLANT,

versus

NUR AHMAD AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 66 OF 1907.

Punjab Pre-emption Act (II of 1905, Local), Section 11—Pre-emption—Rights of members of vendor's tribe and other agriculturists.

Held, that under Section 11 of the Punjab Pre-emption Act a member of the vendor's tribe has a superior right of pre-emption to that of an agriculturist, as defined in Section 2 of the Punjab Alienation of Land Act.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 9th November 1906.

Mr. Fazl Ilahi, Advocate, for appellant.

Mr. Gurcharn Singh, Advocate, for respondents.

JUDGMENT.

LAL CHAND, J.—(29th March 1907).—This was a claim for pre-emption instituted on 1st February 1906, under the Punjab Pre-emption Act No. II of 1905. The property sought to be pre-empted is agricultural land, situated in *Mauza Dhandoli, tahsil Kharian, District Gujrat*. The plaintiff appellant is a *Gujar* and a member of an agricultural tribe as notified for this District under the

Punjab Alienation of Land Act, and so is the vendor. The vendee is a Kashmiri by caste, and is found to be an agriculturist within Section 2 of the Punjab Alienation of Land Act. The sale was effected on 14th September 1905 and registered on the 23rd, but, before registration, the vendee secured a certificate on 20th September from the Collector showing that he was an agriculturist. It was contended before us in reply to appeal that the vendee was a *Rajput*, as he was described in the sale deed as a *Bhatti Kashmiri*. But this contention is obviously futile in the face of description contained in the certificate as well as in the vendee's own application for obtaining the certificate. The description given in the sale-deed evidently means a sub caste of *Kashmiris* and not of *Rajputs*.

The claim for pre-emption was founded in the plaint mainly on an allegation that the plaintiff was a collateral of the vendor, and that was the principal issue fixed in the case. The first Court held it proved that the plaintiff was a collateral of the vendor, and he decreed the suit on payment of Rs. 414 which the Court held to be the fair market value of the property subject to a deduction of Rs. 209 payable to a prior mortgagee.

On appeal the Divisional Judge held that the alleged relationship between the plaintiff and the vendor was not proved by any satisfactory evidence, and he therefore dismissed the suit as "the parties being agriculturists and residents" of the same village had equal power of purchase of the land.

The suit for purposes of jurisdiction was valued in the lower Courts at Rs. 140-10-0, being thirty times the Government revenue assessed on the land. A further appeal was thus inadmissible, the jurisdiction value of the suit being below Rs. 250. But it was contended for appellant on the authority of *Ghulam Ghaus v. Nabi Bakhsh* (24 P. R., 1903 F. B.⁽¹⁾), that the decree directly involved a claim to property exceeding Rs. 250 in value, i. e., the price claimed and allowed, and therefore a further appeal was admissible in the case for respondent. No. 3 P. R., 1896 was relied upon to contend that the suit for pre-emption having been dismissed by the lower Appellate Court, its decree did not directly involve a claim or question relating to property of the value of over Rs. 250, and therefore the principle laid down in the Full Bench judgment in No. 24 P. R., 1908⁽¹⁾ was inapplicable, it is unnecessary to decide in this case on the merits of either contention, as we hold that the question of law argued in appeal, viz., that the plaintiff-appellant

(1) S. C., 35 P. L. R., 1903.

had a superior right of pre-emption under the provisions of the Punjab Pre-emption Act is by itself sufficient to induce the application to be treated as an appeal, even under Section 70 (b) (iv) of the Punjab Courts Act. The contention put forward for the appellant briefly was that inasmuch as both the vendor and the plaintiff-claimant for pre-emption were members of an agricultural tribe, the plaintiff appellant was entitled to pre-emption under Section 11 of the Punjab Pre-emption Act against the vendee who was an agriculturist but not a member of an agricultural tribe. This contention was not clearly entered in the grounds of appeal, but it raised a question of law which went to the very root of the dispute. We therefore gave leave to the appellant to urge the contention, and on request by the Counsel for the respondent gave him further time under Section 542, Civil Procedure Code, for contesting the case on that ground.

After hearing arguments on either side and examining in detail the provisions of the Punjab Pre-emption Act, we are of opinion that the contention raised for the appellant is sound and is bound to prevail. The right of pre-emption is defined by Section 4 of the Act to "mean 'the right of a person to acquire agricultural land..... 'in preference to other persons.'" By Section 5 it is enacted that "a right of pre-emption shall exist in respect of agricultural land and village immoveable property, but every such right shall be subject to all the provisions and limitations hereinafter in this Act contained.

Section 11 prescribes that "no person other than a member of an 'agricultural tribe shall have a right of pre-emption in respect of agricultural land", provided that if the vendor is not a member of an agricultural tribe, the right of pre-emption may be exercised also by a member of the same tribe as the vendor under certain conditions embodied in the proviso. Section 12 ordains the order in which the right of pre-emption in respect of agricultural land shall vest subject to the provisions of Section 11, and Section 14 provides for an exercise of the right where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption. The procedure for giving notice where agricultural land proposed to be sold is subject to a right of pre-emption is laid down in Section 16, and Section 18 empowers any person entitled to a right of a pre-emption to bring a suit to enforce that right when the sale has been completed. Finally, after directing under Section 20 that in every suit for pre-emption in respect of agricultural land

the Court shall of its own motion enquire into and decide certain prescribed issues whether the facts involved therein be admitted or not, it is enacted under Section 21 that if in the case of a sale of agricultural land the Courts find that the plaintiff is not a member of an agricultural tribe and is entitled to claim pre-emption under the proviso to Section 11 of the Act, the Court shall dismiss the suit. It is clear on the face of these provisions that a right of pre-emption in respect of agricultural land is prescribed by the Act to exist absolutely and is declared to be vested primarily in members of agricultural tribes. It is conceded in favour of persons other than such members contingent only on conditions laid down in the proviso to Section 11, and the very first of these conditions is that "if the vendor is not a member of an agricultural tribe." As against a vendor, who is a member of an agricultural tribe, any person other than a member of an agricultural tribe, has absolutely no right of pre-emption be he an agriculturist or not. The whole scheme of the Act as laid down in the various sections already referred to probably aims at limiting the right of pre-emption in favour of a member of an agricultural tribe when the vendor is a member of an agricultural tribe. It was contended by the counsel for the respondent that a sale in favour of an agriculturist does not contravene the provisions of the Punjab Alienation of Land Act, that the right of pre-emption in favour of an owner in the village was an ancient right, that such right was not abrogated by the Act and he relied upon Section 12, clause (a) of the Act in order to support his contention. But the whole argument is founded on a fallacy and is not in the least supported by the provisions of the Act under consideration. It is true that the Punjab Alienation of Land Act justified a sale in favour of an agriculturist by a member of an agricultural tribe, and the sale therefore in the present case by a *Gujar* vendor to a *Kashmiri* vendee, who is an agriculturist, is legal and valid. But a right of pre-emption is primarily and essentially a right of priority to buy, and such right, under such circumstances, is conferred by law on a member of the agricultural tribe only and not upon a mere agriculturist. A right of pre-emption is a legal right such as need not be exercised at all. If therefore no suit to enforce the right were instituted, the vendee would be competent to retain his sale. But if a member of the agricultural tribe elects to exercise his prior right to buy, the law says he shall be entitled to exercise it. It is an entire fallacy to say that a right of pre-emption was vested of old in an owner of the village, and there-

fore the plaintiff is not entitled to assert the right as against such owner. The provisions of the Act are in the first place exhaustive and make no such exception as is contended for. But, moreover, the old custom doubtless preferred an owner of a village to a stranger, who did not occupy land in the village. This is amply borne out by the provisions embodied in the early Settlement records. But there is no warrant for the assertion that as between owners in the village the old custom did not prefer a member of the same tribe to a person who was not. Whether it was or was not the case may possibly be a debatable question, but it has now been finally set at rest by the provisions of the Punjab Pre-emption Act. Section 12, clause (d), relied upon in argument, does not in any manner support the respondent's contention. The word pre-emption is not used in the clause, but the context itself is expressly rendered subject to the provision of section 11 which, as observed already distinctly, provides that "No person other than a member of an agricultural tribe shall have a right of pre-emption in respect of agricultural land and decidedly not when the vendee is a member of an agricultural tribe."

It was finally suggested by the Counsel for the respondent that the point raised being a novel one and of widespread interest, the case be referred to a Full Bench for decision. But we do not see sufficient grounds for adopting the course suggested for our acceptance. The question argued is doubtless novel as it would be, the Act itself under which it is raised being a recent provision, and it no doubt involves a point of general interest. But the matter appears to us to be apparent on a plain reading of the section, and obviously admits of no reasonable doubts in its solution or decision. We therefore decline to make the suggested reference and hold that the plaintiff is entitled to a right of pre-emption in this case against the vendee, who is an agriculturist but is not a member of an agricultural tribe. There were two further contentions raised by the vendee in his grounds of appeal in the lower Appellate Court, *viz.*, that the plaintiff had lost his right of pre-emption by acquiescence in the bargain of sale, and that the appellant was in any case entitled to receive the full amount entered in the sale deed, *viz.*, Rs. 600, as it was fixed *bona fide*, and, moreover, represented the fair market value of the property sold. As regards acquiescence we are satisfied that no legal acquiescence is proved on the

record so as to stop plaintiff from asserting his right of pre-emption. As regards the price to be paid, the Counsel for the parties agreed to leave the matter in our hands in order to avoid further delay and expenditure, which would be caused if the case were now remanded to the lower Appellate Court. After considering the matter, we are of opinion that Rs. 500 is the fair market value of the property sold, and fix it accordingly. We accept the appeal, reverse the decree of the lower Appellate Court, and, in modification of the decree passed by the first Court, grant a decree to plaintiff for pre-emption of the land in suit on payment of Rs. 500, subject to deduction of Rs. 209, payable to the prior mortgagee, and further deduction of such amount as he has already deposited in Court in pursuance of the decree passed by the first Court. The plaintiff shall, subject to deduction as aforesaid, pay the remaining balance into Court on or before 15th May next, but on default in such payment his suit shall stand dismissed with costs. As plaintiff has failed on the principal ground entered in his plaint and has succeeded on a ground which does not appear to have been expressly urged in the lower Courts, we direct the parties to bear their own costs throughout.

Appeal allowed.

APPELLATE SIDE.

No. 175.

CIVIL.

Before Sir William Clark, Kt., Chief Judge and Mr. Justice Reid.

ALLAH DITTA AND OTHER,—(DEFENDANTS),—APPELLANTS,

versus

SHAHUA,—(PLAINTIFF),—RESPONDENT.

CASE No. 461 of 1906.

Custom—Pre-emption—Sharik shikmi—Wajib-ul-arz. Entries in—Record of custom in favor of collaterals in first settlement—Presumption.

Held, that jointness of holding was not essential to the status of *sharik shikmi*, the term being applicable where the family bond of union still exists.

When the earlier *wajib-ul-arz* of 1855 allowed right of pre-emption in favour of *sharkiyani shikmi* and the subsequent record of rights merely referred to the provisions of Act IV of 1872—

Held, that the entry in the *wajib-ul-arz* raised a pre-sumption of the existence of the custom of pre-emption.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 4th April, 1906.

JUDGMENT.

REID, J.—(19th January, 1907).—The question for consideration is whether the plaintiff-respondent is entitled to pre-emption in respect of a sale by his collateral of land which at the date of the first settlement, 1855, formed part of the joint holding of three brothers, one of whom was paternal grandfather of the vendor while another was father of the plaintiff-respondent.

The tenure of the village is imperfect *bhaiachara* and the purchaser is not a collateral of the vendor.

The record of rights of 1855 recited that there had been no sales in the village up to that time and declared that in the event of a sale *sharkiyani shikmi* would be entitled to preference. This declaration was not cancelled by the subsequent record of rights which merely referred, on this subject, to Act IV of 1872. Of nine sales since 1855 only one was contested by a pre-emptor and the suit was compromised by allowing the then plaintiff to take the bargain off the hands of the vendor, a nephew of the present vendor.

The Lower Appellate Court has found that the plaintiff must be considered a *sharik shikmi*, though the joint holding of 1855 had been subsequently

divided, as if it had not been divided, he would be co-sharer, being descended from the common ancestor owner. This finding is in accordance with *Maulvi Ilahi Bakhsh v. Kaki* 87 P. R., 1895, at page 415 of the report, where it was held that jointness of holding was not essential to the status of *sharik shikm*; the term being applicable where the family bond of union still exists. The value of the declaration in the record of rights of 1855 must be considered with reference to *Dilsukh Ram v. Nathu Singh* 98 P. R., 1894, F.B., *Masta v. Pohlo* 52 P. R., 1896, *Jawahir v. Radha* 35 P. R., 1905,⁽¹⁾ and *Ali Muhammad v. Piran Ditta* 70 P. R., 1905⁽²⁾, the effect of which is to make it evidence of the existence of the custom declared, such as raises a pre-sumption of the existence of that custom. This pre-sumption has not been rebutted by evidence of any conflicting custom, and the right of the plaintiff-respondent is, therefore, preferential to the right of the purchaser-appellant.

The fifth and sixth grounds of appeal have not been pressed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 176.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Kensington.

BANSI DHAR AND OTHER,—(PLAINTIFFS),—APPELLANTS,

versus

CHHANGA RAM,—(DEFENDANT)—RESPONDENT.

CASE NO. 986 OF 1906

Religious institution—Manager. Appointment and dismissal of—Jurisdiction of Civil Court—Religious Endowments Act (XX of 1863) Sections 14, 18—Civil Procedure Code (Act XIV of 1882), Section 539—Sanction of Collector when necessary.

No previous sanction is necessary to bring a suit by the Manager of a religious institution for his re-instatement. 122 P. R., 1890 followed.

So far as the *muafi* grant is concerned the executive authorities have the right of superseding a *muafidar* for improper application of the funds entrusted to him and in that case they have the sole responsibility for appointment of his successor within the conditions of the original grant.

Previous sanction either under Sections 14 and 18 of Act XX of 1863 or Section 539 of the Civil Procedure Code is necessary before a suit can be filed

(1) S.C., 15 P. L. R., 1906,

(2) S.C., 98 P. R. L., 1906.

for the removal of the Manager of a religious institution. It is not open to a self constituted Committee in the event of dispute with the Manager to take the matter into their own hands, and if they do so they run the risk of a successful suit by the ex-manager for re-instatement.

In each particular case it has to be considered whether the previous sanction for a suit should be obtained under Act XX of 1863 or under Section 539 of the Civil Procedure Code.

Bengal Regulation XIX of 1810 was made applicable to Punjab by Act XX of 1863. 95 P. R., 1900 s. c., 6 P. L. R., 1901, referred to.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated 10th August 1906.

Rai Bahadur Bakhshi Sohan Lal, Pleader for Appellants.

Rai Sahib Lala Sukh Dyal, Pleader for Respondent.

JUDGMENT.

KENSINGTON, J.—(20th March, 1907.)—The principal plaintiff-appellant in this case is Bansidhar, who succeeded to the managership of the temple in or about 1888 and was recognised in 1890 as the assignee of the large *muafi* grant of some Rs. 1,300 made by Government in 1865 under certain conditions for the support of the institution. As regards the other plaintiff Gheplia it is not clear that he has so far been recognised by the Revenue Authorities as entitled to be associated in the management or to share in the *muafi* grant in succession to his brother Beli, who died in 1900. There was a dispute between the two men at mutation, and by order of the Collector, dated 16th January 1902, mutation was suspended, the parties being referred to a civil suit. They settled their differences in the Civil Court, but we do not know whether the arrangement made between them has ever been recognised by the Collector. The point is not material for purposes of the present case as the broad question to be decided by us is whether the plaintiffs' family has been rightly dismissed from the management in March 1904, and we are not now concerned with the rights of the plaintiffs *inter se*. The plaintiffs may therefore be treated as joint in interest even if there should not as yet have been any formal order admitting Gheplia to a share in the management or *muafi*.

The suit was instituted by plaintiffs in October 1904 in consequence of their ouster in March, and following *Bawa Sukhram Das v. Barham Puri*, 122 P. R. 1890 it has been correctly held that no previous sanction is

required for such suit. The Courts have differed. The District Judge decreed in plaintiffs' favour for their re-instatement, but the Divisional Judge reversed this decision and dismissed the suit and the case is now before us on further appeal by the plaintiffs.

The circumstances of the case and the main points for consideration appear sufficiently from the judgments of the Lower Courts, and though the case is of some importance, it is not necessary for us to discuss it at great length. We are satisfied that nothing like a sufficient case has been established for depriving plaintiffs of their position as managers of the temple. We feel obliged to say that in so far as their ouster is the result of executive action, that action (though clearly taken solely in what was understood to be the best interest of the temple institution) has not been guided by a proper consideration of the circumstances under which plaintiffs' management has been impugned.

There is nothing on record to show that the plaintiff Bansidhar after his formal appointment as manager in 1888 neglected his duties or abused his trust in any way up till the date of Beli Ram's death in 1900. He may have done so but there is absolutely no evidence on the point, and we are bound to go by the facts as disclosed in the suit. Even now there is not a scrap of evidence against him of immorality, waste of institution funds, or even of general unfitness for his position, and looking to the fact that the Committee appointed in 1904 under the presidency of the Raja of Lumbagraon was willing to retain him in his post subject only to a condition that he should find security in a sum of Rs. 1,200, we can only suppose that no serious charge of incompetency was brought against him. The order for provision of security may or may not have been justifiable, but it was certainly not justifiable to require the plaintiffs to find this considerable sum within a week and to dismiss him from his post merely because he did not or could not comply with so harsh a condition.

The circumstances leading up to this Committee's appointment and also to some extent explaining their requirement of security from the plaintiffs are as follows. On the 16th September 1902 a petition was presented to the Deputy Commissioner complaining of neglect of four institutions including the Sujampur Temple. The Deputy Commissioner enquired into the matter, found that the Sujampur Temple was being neglected, and asked the Raja of Lumbagraon to appoint a Committee to ensure better arrangements. What the Deputy Commissioner himself overlooked, and what was apparently never brought to the notice of the Raja of Lumbagraon was that Bansidhar could

not be fairly held responsible for recent neglect. From 1900 onwards the whole of the *munafi* grant by which the institution was mainly supported had been sequestered in consequence of the dispute between Bansidhar and Gheplia. We can make no conjecture as to why this course was taken by the Deputy Commissioner, but his various orders on the petition leave no doubt as to the facts. For the two years preceding the petition, and for the further 1½ years till Bansidhar was ousted from the management, the supply of funds to him was withheld, and it is hardly a matter for surprise that under these circumstances the temple had a neglected appearance by 1903 and still more so by 1904. So far from Bansidhar being to blame we have it in evidence by the first and principal witness for defendants, namely Devi Dial, described as *wazir* of the temple, that Bansidhar during this three years' period borrowed and spent Rs. 2,000 to try and keep things going satisfactorily. The statement may be an exaggeration, but it no doubt correctly indicates the straits to which he was reduced for apparently no fault of his own. He was still the *munafidar* and as such entitled to the money grant till he was superseded.

We do not suggest that the District Officers have not authority to withhold a grant for sufficient reason, but if they act in this manner, the manager's difficulties should be taken into account.

We feel bound to accept the appeal for these reasons, but as it is always possible that the plaintiffs, though now re-instated, may hereafter fail to carry out their duties properly, it is desirable to make it clear what course should in that case be pursued.

So far as the *munafi* grant is concerned the executive authorities have the right of superseding a *munafidar* for improper application of the funds entrusted to him, and in that case they have the sole responsibility for appointment of his successor within the conditions of the original grant.

In regard to the management where there is a duly constituted manager, the position is correctly stated by the District Judge towards the end of his judgment where he discusses issue 2. There is a misprint in the paper book and what the District Judge really laid down was that "if the people object to a manager, it is for them to bring a Civil Suit." This is the proper course to take, and for such Civil Suit previous sanction is required under either Sections 14 and 18 Act XX of 1863 or Section 539, Civil Procedure Code. It is not open to a self-constituted Committee in the event of dispute with the

manager to take the matter into their own hands, and if they do so, they run the risk of a successful suit by the ex-manager for re-instatement. This is a remark of general application, and in each particular case it has to be considered whether the previous sanction for a suit should be obtained under Act XX of 1863 or under Section 539, Civil Procedure Code. It has been held that Bengal Regulation XIX of 1810, was under Act XX of 1863 applicable to the Province for reasons given in *Gopal Ram v. Kahari Ram*, 95 P.R., 1900⁽¹⁾ where the point was carefully considered in regard to a somewhat similar temple institution in Kuluk.

We make these remarks for general guidance, as cases of the kind are now not infrequent and there is a good deal of misunderstanding in Civil Courts as to the way in which they should be treated. Civil Appeal No. 359 of 1901⁽²⁾ decided on the 3rd February, 1905, may be usefully referred to.

The appeal is accepted. The decree of the Divisional Judge is reversed and that of the District Judge in favour of plaintiffs is restored with costs throughout.

Appeal allowed.

APPELLATE SIDE.

No. 177.

CIVIL.

Before Mr. Justice Reid.

IMAM BIBI,—(DEFENDANT),—APPELLANT,

versus

GHULAM HUSSAIN and others,—(PLAINTIFFS),—RESPONDENTS.

CIVIL APPEAL No. 371 OF 1906.

*Civil Procedure Code (Act XIV of 1882), Sections 562, 588 (28)—Remand.
Appeal against order of—Powers of Chief Court.*

Held, that as soon as it is held by the Chief Court in an appeal against an order of remand passed under section 562 of the Civil Procedure by the Lower Appellate Court that the remand order appealed is not warranted by the terms of the section in as much as the case has not been disposed of by the Court of first instance upon a preliminary point, the Chief Court cannot enter upon, or in any way deal with, the spurious preliminary point which the lower appellate Court had wrongly held to justify the remand order. The appellant is not at liberty to withdraw in the Chief Court, his objection to the form of the order

(1) S.C. 6 P.L.R., 1901.

(2) S. C., 52 P. L. R., 1905.

and obtain decisions on points of which according to his contention the Lower Appellate Court should have determined the appeal in his favor—6 P. R. 1892 followed, 1 P. R., 1903 (F.B.) S. C. 1 P. L. R., 1903 (F.B.) referred to.

Miscellaneous further appeal from the order of Captain B.O. Roe, Divisional Judge, Jullundur Division, dated 23rd March 1906.

Pandit Sheo Narain, Pleader for appellant.

R. S. Lala Sukh Dial, Pleader for respondents.

JUDGMENT.

REID, J.—(11th May 1907)—The pleader for the respondents admits that the order of remand under Section 562 of the Code of Civil Procedure was erroneous, the suit not having been decided upon a preliminary point, and that the remand should have been under Section 566, if, indeed, necessary. The pleader for the appellant contends, on the authority of the *Maha Ram v. Ram Mahar*, 1 P. R., 1903, F. B.,⁽¹⁾ that he is entitled to waive his objection to the form of the order and to contest the decision of the Lower Appellate Court on the questions of *resjudicata*, barred by section 43 of the Code, and limitation, which the appeal below involved.

The authority cited does not help him. The reference to the Full Bench was with a view to a ruling on the question whether this Court is bound, on an appeal under Section 588 (28) of the Code, to consider a point which it could not have considered had the lower Appellate Court passed a decree instead of an order under Section 562. The answer was in the affirmative, but *Mussammatt Makhan Devi v. Asa Singh* 6 P. R. 1892, far from being dissented from, was approved. In that case it was ruled that as soon as it is held that the remand order appealed is not warranted by the terms of the section, inasmuch as the case has not been disposed of by the Court of first instance upon a preliminary point, the High Court cannot enter upon, or in any way deal with, the spurious preliminary point which the lower Appellate Court had wrongly held to justify the remand order.

The anomaly which now exists in appeal under Section 588, (28) of a High Court having to consider questions of fact and law in petty cases would be aggravated if it were ruled that a party can, by waiving the objection to the form of the order force the High Court to decide points on which the Lower Appellate Court should decree or dismiss the appeal before it, and in my opinion that ruling would be erroneous. The Full Bench ruling cited is certainly

(1) a.c., 1 P.L.R., 1903 (F.B.).

not authority for it, and was based on the assumption that the remand was on a preliminary point.

I allow the appeal, set aside the order of remand, and return the record to the Lower Appellate Court for disposal in accordance with law.

Costs of this Court will be cost in the cause.

Appeal allowed.

REFERENCE SIDE.

No. 178.

CIVIL.

Before Mr. Justice Reid.

GUJAR,—(DEFENDANT)—APPELLANT,

versus

DULA,—(PLAINTIFF),—RESPONDENT.

CASE No. 28 OF 1907.

Punjab Tenancy Act (XVI of 1887) Section 77 (3) (j)—Jurisdiction of Civil and Revenue Courts—Suit by a chamar for recovery of haq sep.

Held, that a suit by a *chamar* for the recovery of *haq sep* due to him under the terms of the *wajib-ul-arz* of the village is cognizable by a Civil Court.

Case referred by Lala Kesho Das, District Judge, Jullundur, on 4th February 1907.

Both parties absent—

This was a suit by a *chamar* for the recovery of *haq sep* under the terms of the *wajib-ul-arz* of the village. On appeal the District Judge referred the suit under Section 100 of the Punjab Tenancy Act to the Chief Court, with a recommendation that the decree of the Munsif be registered as that of an Assistant Collector.

REID, J.—(15th May 1907).—This is a suit by a labourer for his wages at the rate fixed by the record of rights. The fact that the rate is fixed by the record of rights does not make the wages payable a cess and Section 77 (3) (j) of the Tenancy Act is not, in my opinion, applicable.

The suit is for the wages of a labourer and is cognizable by a Civil Court.

I return the record to the District Judge.

APPELLATE SIDE.

No. 179.

CIVIL.

*Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.*ISHRI PERSHAD AND OTHERS,—(DEFENDANTS),—APPELLANTS,
versus

BESHESHAR NATH AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 171 OF 1907.

*Custom—Pre-emption—Houses—Vicinage Kucha Pati Ram of Delhi City.**Held*, that pre-emption in respect of sales of houses by reason of vicinage prevailed in Kucha Pati Ram of Delhi City.

A member of a joint Hindu family having as such a share in a house is entitled to claim right of pre-emption by reason of his being owner of the share.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated 22nd December 1906.

Mr. Shadi Lal, Advocate, for appellants.

Lala Dwarka Das, Pleader, for respondents.

JUDGMENT.

REID J.—(4th February, 1908).—The first question for consideration is whether the plaintiff-respondent has established that the right of pre-emption by reason of vicinage exists in respect of the house sold.

The contention that *Kucha Pati Ram*, in which the house is situate, is a separate sub-division of Delhi City for the purposes of pre-emption has no force. No authority in support of the contention has been cited, and the recognition of single lanes or streets as sub-divisions is obviously opposed to the principle governing suits for pre-emption in towns, and would merely tend to promote litigation and uncertainty as to rights in property.

Three instances of the exercise of the right in respect of houses in streets or lanes opening on to the *kucha Pati Ram* and very near it in 1888 and 1902 had been established and in each case the parties to the suit were described as residents of *kucha Pati Ram*. In *Abdulla Beg v. Walaiti Begam* 120 P. R., 1906 it was held that pre-emption in respect of sales of houses by reason of vicinage prevailed in *Kucha Akal Khan* of Delhi City, and that instances in neighbouring sub-divisions and in the city are relevant in support of the existence of the right. It was fur-

ther found that in 1886 sixty instances of the existence of the right in various parts of the city were established. We have no hesitation in holding that the existence of the right in respect of the house sold has been established.

The evidence on the record satisfies us that the plaintiff-respondent and his father are members of a joint Hindu family, and that the respondent, as a co-sharer in their house, which adjoins the house sold, can exercise the right of pre-emption unless the right of the purchasers is equal to his. We are satisfied that the purchase was not effected by the purchasers on behalf of the temple which adjoins the house sold, and the mere fact that they intended to use that house as, or build on its site, a *dharmsala* in connection with the temple does not give them a right of pre-emption. They admittedly do not own houses adjacent to the house purchased by them, and it has not been established that the temple is their property. We concur in the concurrent findings of the Courts below, that not more than Rs. 1,010 of the purchase-money expressed in the sale-deed passed, and we see no reason for further inquiry into the market-value of the house in suit. The appellants had ample opportunity of adducing evidence of the market value, and did not avail themselves of the opportunity; and the amount disallowed is Rs. 200 only. It is extremely unlikely that any satisfactory estimate of the market value within this sum could be arrived at by further inquiry.

The appeal fails and is dismissed with costs.

Appeal dismissed.

REVISION SIDE.

No. 120.

REVENUE.

Before Hon'ble Mr. James Wilson, C. S. I., Financial Commissioner.

KARTAR SINGH AND ANOTHER,—(DEFENDANTS),—PETITIONERS,

versus

PURAN,—(PLAINTIFF),—RESPONDENT.

CASE No. 233 OF 1906-07.

Runjab Tenancy Act, (XVI of 1887), Section 5 (1) (b)—Landlord and tenant—Occupancy rights—Shamilat deh—Muafi—Resumption of—Status of owners of land in possession as tenants.

When land, the revenue of which has been assigned, is on resumption settled with the *muafidar's* heir, he is ordinarily entitled to receive the landlord's profit in the land, and to eject the tenants unless they can prove that they have acquired a right of occupancy. The mere facts that the land is land owned in common by

the whole village and that some members of the proprietary body are the cultivators of the land do not give these cultivators a right of occupancy.

Petition for revision of the order of Major P. S. M. Burlton, Collector, Jullundur, dated 20th January 1908.

Mr. Vishnu Singh, Advocate for Petitioners.

Mr. Devi Dyal, Advocate for Respondent.

JUDGMENT.

James Wilson, F. C.—20th January 1908.—The facts of these five cases (Nos. 233—237) are as follows :—

Many years ago the proprietors of the village of Chak Dana granted out of the land owned in common by the village community (*Shamilat dah*) a small area to be held free of land revenue by *Udasi Fakirs*. The land has always been entered in the Revenue papers as owned by the village community, and cultivated by individual members of that community, who paid a share of the produce to the *Fakir*. In 1848 the Settlement Officer found Ram Das, *Udasi Fakir*, in the enjoyment of this share of the produce and orders were passed recognizing the *muafi* for the life of Ram Das. On his death in 1870 the *muafi* was resumed, and as it was found that the *muafidar* had made a well and planted a garden, the settlement of the land was made with his heirs by order, dated 13th October, 1871. The *muafidar's* heirs now wish to eject from the land the individual proprietors who are cultivating it, and the Lower Courts have held that they have not the power to eject, as the actual cultivators have acquired as against the *muafidar's* heirs, a right of occupancy under Section 5 (1) (b) of the Punjab Tenancy Act.

The question is what exactly is the position occupied by the *muafidar's* heirs in consequence of the orders settling the land with them. The present rule and practice on the subject are stated in paras. 182 to 185 of Douie's Settlement Manual. In the first place it is clear that the order entitles the *ex-muafidar's* heirs to receive the rent from the land and renders them liable to pay the land revenue assessed upon it. It seems also clear that it entitles them to exercise the rights of landlord over the tenants who actually cultivate the land, and unless the cultivator can show that they have acquired a right of occupancy in the land, they must be liable to ejectment at the will of the *ex-muafidar's* heirs, with whom the settlement has been made.

If the tenants had not been from among the proprietary body of the village, they could not have established any right of occupancy, as they

have been paying rent in kind and cannot acquire a right of occupancy by mere lapse of time. Does the fact that they are among the proprietary body entitle them to a right of occupancy? If the claim is made on this ground it is met by Section 10 of the Act which distinctly says that in the absence of a custom to the contrary, no one of several joint owners shall acquire a right of occupancy under this chapter in land jointly owned by them. The land is still jointly owned by the proprietary body of the village, of which the tenants of this land form a part, and as no special custom is alleged, it is clear that these tenants cannot acquire a right of occupancy as against the general proprietary body.

Can they then, as has been found by the Courts below, acquire an occupancy right as against the *muafidar's* heirs though not against the general proprietary body? I do not think so, as the whole intention of the Act appears to be that if a tenant acquires a right of occupancy at all it shall hold good as against all others having rights in the land. Moreover, to establish a right of occupancy under Section 5 (1) (b) of the Act, it is necessary to prove that the tenant once owned the land and has ceased to be landowner thereof; but these cultivators have not ceased to be owners of the land. It is still owned by the village proprietary body in which they have shares, and if for any reason, such as the failure of heirs of the *muafidar*, the sub-settlement should come to an end, the land will revert to the *shamilat deh* and the present cultivators will be entitled to their share of it as joint owners.

I hold, then, that when land, the revenue of which has been assigned is on resumption settled with the *muafidar's* heir, he is ordinarily entitled to receive the landlord's profit in the land, and to eject the tenants unless they can prove that they have acquired a right of occupancy and that the mere facts that the land is land owned in common by the whole village and that some members of the proprietary body are the cultivators of the land do not give those cultivators a right of occupancy.

In these cases, therefore, I cancel the decrees of the Lower Courts, and direct that the suits be dismissed with costs throughout, subject to the determination by the Court of first instance of the amount of compensation payable, if any, under Section 70 of the Act.

Appeal allowed.

APPELLATE SIDE.

No. 181.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

GANPAT RAI AND OTHERS,—(PLAINTIFFS)—APPELLANTS,

versus

KESHO RAM AND ANOTHER,—(DEFENDANTS)—RESPONDENTS,

CASE No. 262 OF 1906.

Custom—Hindu Law—Succession—Khatris of Satgara town, Montgomery district—Burden of proof—Wajib-ul-arz—Riwaj-i-am—Entries in —

Held, that the parties to the suit, high caste non-agriculturist Khatris of Satgara town in Montgomery district were in matters of succession bound by Hindu Law and not by custom, and that the fact of record of custom in the Wajib-ul-arz of the village and the Riwaj-i-am was not sufficient to apply custom to the present case.

Held, also, that the case was not affected by the admission of applicability of custom made by one of the female parties to the case on a previous occasion.

First appeal from the decree of the District Judge, Montgomery Division, dated the 30th January 1906.

Rai Sahib Lala Sukh Dyal, Advocate, and *Lala Moti Lal*, Pleader for Appellants.

Pandit Sheo Narain, Pleader for Respondents.

JUDGMENT.

ROBERTSON & RATTIGAN, JJ. (29th October 1908).—We have heard arguments at great length in this case, albeit for some reasons best known to the learned pleaders engaged for the appellant, the argument in reply was allowed to come to an abrupt conclusion.

The case before him is thus stated by the learned District Judge—

The property in dispute belonged to Ganga Ram, who died without male issue, more than forty years ago. *Mussammat Jawala Devi*, defendant, is his widow and *Kesho Ram*, defendant, is his daughter's son. On 28th February 1904 *Mussammat Jawala Devi* executed a gift deed of the property in dispute in favour of *Kesho Ram*, defendant. The deed was registered on 29th February 1904. The plaintiffs stated that they are the reversionary heirs of Ganga Ram; that *Mussammat Jawala Devi* was entitled to maintenance only and had no power to make a gift of the property which was ancestral in favour of *Kesho Ram*, defendant. They have brought this suit to have it declared that the alienation in

question will not affect their interests after the death of *Mussamat Jawala Devi*.

The defendants contended that they were *Khatris*, and as high caste Hindus were governed by Hindu Law in matters regarding succession, &c., and that according to Hindu Law, Kesho Ram, who was the son of Ganga Ram's daughter, excluded plaintiffs, who were Ganga Ram's collaterals, from succession to the property in dispute. It was also contended that there was no custom whereby collaterals excluded daughters' sons from succession, and that the gift being in favour of the next heir was valid. The plaintiffs contended that although they were *Khatris*, yet in questions of succession to land they were governed by custom and not by *Dharm Shaster*.

The only question however which is before us for decision is, whether or not the parties are, for purposes of succession to the property in question, governed by Hindu Law or agricultural custom.

Part of the property is agricultural land in various villages of the Montgomery district.

The parties are admittedly high caste *Khatris*, governed in other matters by Hindu Law, wearing the sacred thread, and in all particulars conducting themselves as high caste Hindus living under their personal law. They live and have lived for generations in Satgara which was once a walled town of some importance and which still retains the characteristics of a town. Albeit a decayed one. It is quite clear too, and we may dispose of this point at once, on the evidence, that none of the parties are in any sense agriculturists, thereby differing altogether from the parties concerned in the case decided in 21 *Punjab Record* of 1896 who were found on the facts to be agriculturists. Here the evidence is conclusive that the parties are not now and never have been agriculturists. They have merely bought land and enjoyed its income.

Upon these premises it is clear, in accordance with an overwhelming consensus of authority that the *onus* lay very heavily upon the plaintiffs to establish their claim to be governed by agricultural custom as regards succession to agricultural land.

They seek to establish this proposition in three ways:—

- (1). Entries in the *Wajib-ul-arz* (village administration paper) of the villages in which the lands are situated.
- (2). Entries in the *Riway-i-am* (statement of tribal custom).

(3). Instances in which collaterals were preferred to daughters or daughters' sons.

The entries in the *Wajib-ul-arz* are undoubtedly in favour of the plaintiffs' contention. But in our judgment these entries, while they are to be accepted as evidence, are wholly insufficient to establish the factum of the custom set up. They may represent the wishes of those who made them, or they may simply represent the ordinary entry made in the *Wajib-ul-arz* of the villages throughout a district mainly Muhammadan. But they seek to support a custom in defeasance of the rights of persons who were no parties to that declaration, i. e., the female relatives of the signatories, and it is quite clear that no body of men can deprive another set of right holders under personal law, by these three mere *ipse dixit* that their custom is different from personal law. No doubt usurpation successfully carried out for a long time may possibly eventually establish a custom, but it is necessary in such a case to show not merely that a certain person desires such and such to be the custom to the detriment of the rights of others, but that such and such have really become a binding custom fully established and followed. But as remarked by Clark, Chief Judge, and Reid, Judge, in 54 *Punjab Record* of 1906⁽¹⁾ and also in 24 of 1893 it is the clear duty of the Courts to watch with very special care over the rights and interests of the weak as against the strong, and in particular to see that the rights of the weaker sex are not sacrificed to a desire on the part of the "agnate" to take advantage of customs obtaining around him which are more favourable to himself and his sex. We think in this case that the value of the entries in the *Wajib-ul-arz* is not great, being discounted by the other facts of the case, and that they are of quite insufficient weight to override the rights of females under their personal law, and the strong presumption that there is in the other direction.

These remarks also apply to the entries in the *Riwaj-i-am* in regard to which it is further to be noted that the officer responsible for it, Mr. Purser, one of the ablest and most reliable Revenue Officers of the Punjab, distinctly warns us not to trust it, especially in regard to questions such as the present.

Having reached this point we must examine into the question, is the custom established *aliunde*.

We have examined very carefully into the so-called instances quoted.

(1) S. C., 74 P. L. R., 1907.

It is quite clear that all the instances of any value are not merely compatible with Hindu Law, but were actually instances in which it was followed. The parties being high caste Hindus the presumption in each case was that there was a joint Hindu family. No evidence to the contrary has been given in any one of the cases, but in several there is direct evidence of jointness and the successions are precisely what would take place in a Hindu family under Hindu Law.

Looking at the whole of the instances given in support of the plaintiffs' case it is quite clear that these are totally insufficient to establish the custom set up.

One other point requires mention.

It appears that in 1899 the widow Jawala Devi made a gift to Kesho Das and got the collaterals to recite their consent. This it is contended was an admission of the existence of the custom set up.

It may have been, but, even so, the admission by the widow on a misapprehension of the law could not be very important and it may have well been nothing more than a wise precaution. We do not look upon its value as great, but as stress was laid upon it by the appellants it is as well to mention it.

Having found that the plaintiff has quite failed to establish his case it is unnecessary to labor through the instances quoted for the defendant. Two or three at least appear to be of value. We find that the parties are governed by Hindu Law in regard to succession to the property in dispute.

The appeal fails and is rejected with costs throughout.

Appeal dismissed.

REVISION SIDE.

No. 182.

CIVIL.

Before the Hon'ble Mr. Justice Clark, Kt., Chief Judge.

SARDAR SHAH AND ANOTHER,—(DEFENDANTS),—PETITIONERS.

versus

HAJI—(PLAINTIFF) AND MOHAMDA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

CASE No. 1459 OF 1908.

*Limitation Act (XV of 1877), Schedule II, Article 44—Limitation—
Minor—Suit for possession of immoveable property—Muhammadan Law—
Transfer by de facto, but not legal guardian.*

An alienation by a *de facto* guardian who is not legal guardian of the minor and is not authorised by custom to transfer his ward's property is void, and the suit brought by the minor after attaining majority for possession of immoveable property against the transferee from such guardian is not governed by article 44 of the second schedule of the Limitation Act, for it is not necessary for the minor to have the alienation set aside

Petition under section 70 (1) a and b of Act XVIII of 1884 as amended by Act XXV of 1899 from the decree of the Divisional Judge, Lahore Division, dated the 27th May 1908.

Messrs. Lal Chand and Fazli Hussain, Advocates for Appellants.

Rai Sahib Mr. Sukh Dial, Advocate, and Lala Tirath Ram, Pleader for Respondents.

JUDGMENT.

CLARK, C. J.—(30th October, 1908.)—In 1896 Mohamda, the uncle of plaintiff, a minor, and Mussammat Mehran sold 13 kanals $8\frac{1}{2}$ marlas land for Rs. 250 to one Karam Bukhsh.

Mohamda had $\frac{1}{4}$ share, plaintiff $\frac{1}{4}$ share, and Mussammat Mehran $\frac{1}{2}$ share in the land.

Plaintiff, who was 23 years of age when he filed this suit, sues for possession of $\frac{3}{4}$ of the land, namely his own $\frac{1}{4}$ on the ground that his uncle had no power to sell his share, and for Mussammat Mehran's share, because she remarried six months after the sale, and had no necessity for the sale.

The first question for consideration is, whether plaintiff's claim as regards his $\frac{1}{4}$ share is barred by limitation under Art. 44, Schedule II of the Limitation Act, that is, whether Mohamda was plaintiff's guardian, within the meaning of that article.

The powers of a *de facto* guardian were considered by a Full Bench P. R. 73 of 1890, and Mr. Justice Rivaz remarked "the rule to be deduced from these cases applicable to this province appears to be that in the absence of a special custom to the contrary a *de facto* guardian who is neither a near guardian by Muhammadan Law, nor by appointment by the Court cannot bind the minor's property by his acts of alienation.

This rule has been followed in the later decisions of this Court. An attempt was made in this case to prove that there was a custom admitting an uncle to alienate his minor nephew's property. I am unable to hold that the instances of acquiescence in transfers by uncles of their minors' property proves a custom. In *P. R.* No. 65 of 1893 the same view was taken. *P. R.* No. 19 of 1902⁽¹⁾ differs from this case because there it was held that the record of rights appointed the brother guardian, i. e., that there was a custom of appointing a brother as guardian.

As I hold that in this case no such custom is proved it follows that Mohamda was not a guardian within the meaning of article 44.

The sale by Mohamda of plaintiff's share was altogether void, and plaintiff was entitled to treat it as a nullity and not bound to set it aside, nor to sue under article 44 or 91 of Schedule II of the Limitation Act (*P. R.*, No. 57 of 1891, and No. 52 of 1895).

As regards *Mussammat Mehran's* half. It has been proved by the Divisional Judge that it was not sold for necessity and I see no reason for differing. Even if *Mussammat Mehran* had a daughter to marry, it is not shown that this money was advanced for that purpose.

The fact that *Mussammat Mehran* remarried herself within 6 months of the sale makes it probable that she would try to raise what she could on the estate before she lost it by remarriage.

The Divisional Judge, however, is in error in giving plaintiff a decree for the whole of *Mussammat Mehran's* half-share. Mohamda is entitled to half her share.

I so far accept the revision as to give plaintiff a decree for possession of his $\frac{1}{2}$ share and $\frac{1}{2}$ of *Mussammat Mehran's* half-share or altogether $\frac{1}{2}$ of the property claimed. Under the circumstances of the case, which has been financed for plaintiff by outsiders, I leave the parties to bear their own costs throughout.

Decree modified.

APPELLATE SIDE.

No. 183.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

KHAN ZAMA,—(PLAINTIFF),—APPELLANT.

versus

FATTEH SHER,—(PLAINTIFF),—RESPONDENT.

(1) s. c., 183 P. L. R., 1901.

CASE No. 1263 OF 1906.

Punjab Pre-emption Act (II of 1905), Section 14—Custom—Pre-emption—Joint holding—Sale to co-sharer—Right of other co-sharers.

A co-sharer in a joint holding has no right to pre-empt when the vendor has sold his share in the holding to a person who has also a share in it. Section 14 of the Punjab Pre-emption Act does not provide for the case of a pre-emptor claiming against a vendee who has equal rights with him.

Further appeal from the decree of Mir Jawala Sahai, District Judge, Mianwali, dated 22nd March 1906.

Mr. Gokal Chand, Advocate, for Appellant.

Mr. Beni Parshad, for Respondent.

ORDER OF REFERENCE TO A DIVISION BENCH.

RATTIGAN, J.—(17th January 1907).—The question involved in this case is of importance and should be decided by a Division Bench. It relates to the proper construction of Section 14 of the Punjab Pre-emption Act, 1905, but here there are not two rival pre-emptors with equal rights. The dispute is between a *pre-emptor* and a *vendee*, both of whom are co-sharers in the *khata*.

THE JUDGMENT OF THE DIVISION BENCH.

CHATTERJI, J.—(22nd March, 1907).—The material facts of this case are that a joint *khata* of 27 *kanals* 12 *marlas* of land at Shabbaz Khel was held by four brothers, Fattah Khan, plaintiff, Nur Khan, defendant 2, vendor, Khan Zaman, defendant 1, vendee, and Jahan Khan, who is no party to the proceeding. Some five years before suit Nur Khan transferred his one-fourth share to Khan Zaman, and this suit was filed by the plaintiff for pre-emption of half the land.

Various pleas were raised by the vendee which need not all be noticed here. The only important ones are that the suit cannot be brought for pre-emption of half the property sold, that partition had taken place and that the claim was barred by time.

The first Court decided all the issues in plaintiff's favour and gave him a decree for one-third of the property sold. On appeal the District Judge, who had the powers of a Divisional Judge, enhanced the decree to a half-share.

In the District Judge's Court it was objected by defendant vendee that plaintiff had no prior claim to pre-emption. The same ground is again raised in Revision under Section 70 (1) (b) which being a novel one, under the new Pre-emption Act, has been referred to a Division Bench by the learned Judge by whom the application was first heard. This is the sole point argued before us and requiring decision:

Although the sale took place long before the passing of the Pre-emption Act, the suit was filed after it came into force. Under clause (3) of Section 2 of the Act therefore the claim must be decided in accordance with the provisions of the Act and not otherwise. The suit has been filed within one year of the date of commencement of the Act and is therefore within time under Section 28 of the Act, the limitation being that provided in Article 120 of the Indian Limitation Act and the sale being an oral one of a share in joint property. In fact the question of limitation is not before us.

The first Court gave a decree for one-third of the land on the ground that the three brothers other than the seller are entitled to proportionate shares. The District Judge enhanced the decree to a half share "according to general principles of equity," as the "first of the 4 brothers" forbearance should be equally divided between the vendee and the pre-emptor. The first Court's decree was obviously based on Section 14 of the Pre-emption Act.

Section 14, however, deals with several pre-emptors claiming in respect of the same property, and does not provide for the case of a pre-emptor claiming against a vendee who has equal rights with him. Nor can a principle which would be of use in deciding the present case be deduced from it. Clause (a) is the only clause which deals with claims by co-sharers and provided for their dividing the property pre-empted in proportion to the shares they already hold in the property. The Courts below have evidently decided the claim under this clause. But the language of this clause is clearly inapplicable to a case in which the dispute is between two persons who would have been equally entitled had they both claimed pre-emption, and would have come under clause (a), but one of whom happens to be the vendee and is sued by the other. No rule for deciding such a claim is provided by this or any other clause of section 14 or is deducible from them. There is no other section to which resort can be had for the solution of the question. Clause (e) does

not in terms apply, as this is not a claim by several pre-emptors but only by one. Section 12 of the Act which defines the rights of the different grades of claimants for pre-emption of village property, declare that in the case of sale of a share in joint land the right belongs to co-sharers jointly in the first instance and then to them severally. This means we think that unless a joint claim is made each co-sharer is entitled to claim pre-emption for himself. If the purchaser is a stranger, such a co-sharer, in the absence of a claim by all the co-sharers jointly, can claim and acquire the whole property by pre-emption. There is no provision from which it can be inferred that where the claimant has been able to make a several claim, the acquisition would be for the benefit of other co-sharers.

Is there a different rule if the purchaser happens to be one of the co-sharers? Clearly he does not stand in a different position to that he would hold if he claimed pre-emption singly. All the co-sharers being on an equal footing, on what ground can pre-emption be claimed by one co-sharer against another, when that other acquires a share of the joint property by private purchase? Under the provisions of section 12 his right to buy may be postponed to the right of joint purchase by all the co-sharers, but when such a right is not put forward, there is no reason why he should surrender the whole or any portion of his purchase to another co-sharer, who has exactly the same rights as himself.

The present is not a claim by the co-sharers of the *khata* jointly. Whether excluding the seller and the purchaser, the other two brothers, viz., plaintiff and Jahan Khan, might have sued for pre-emption for the benefit of themselves reserving a third share for the defendant purchaser is a question we need not decide. This possibly is the only way a joint claim by them which would have been superior to that of the purchaser's right could have been brought, though we do not commit ourselves to this view. But the present claim is merely a claim for pre-emption of half a share in the property sold. Such a claim is not contemplated or provided for in the Act. The right of pre-emption attaches to the entire bargain to which the right applies and no change has been made in this respect by the Punjab Pre-emption Act. The claim whether joint or several, must be for the entire property to which the right attaches.

The right of pre-emption is the right to acquire property in preference to other persons, see Section 4 of the Act. The plaintiff singly has no

superior right to that of the defendant vendee, and the decree giving plaintiff a half-share in the purchase is open to the same objection that the decree given in *Ahmad Din v. Mussammatt Hasso*, 54 P. R., 1882, was. It gives plaintiff a right to share in the benefits of the purchase made by the plaintiff and not to be substituted for him in the purchase as all pre-emption must mean, or, in other words, it is a decree for co-emption, not pre-emption. The reasoning of the Full Bench judgment in *Ahmad v. Ghulam Muhammad*, 94 P. R., 1904 F. B., s. o. 103 P. L. R., 1904 F. B., therefore fully applies to it. It is not necessary to report that reasoning here. The present Act has made no provision for co-emption.

It is clear then that the Punjab Pre-emption Act contains no provision for the decision of a claim of the present nature. It must therefore be decided on general principles.

We hold that plaintiff had no priority over the defendant vendee, and that he is not entitled to claim pre-emption by himself against the vendee of the whole or any part of the property sold. His claim must therefore fail.

We accept the appeal and dismiss the plaintiff's claim with costs in all the courts.

Appeal allowed.

APPELLATE SIDE.

No 124.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din, K. B.

BHAGAT RAM, AND ANOTHER,—(PLAINTIFFS),—APPELLANTS,

versus

PARAS RAM, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1298 OF 1906.

Civil Procedure Code (Act XIV of 1882), Sections 520, 525, 526—Arbitration—Award. Application to file—Power to remit defective award—Court Fees Act (VII of 1870), Schedule II, Article 17—Court-fee—Appeal against order refusing application to file private award—Registration Act (III of 1877), Section 17, cl. (i)—Award affecting immoveable property over Rs. 100 in value signed by parties—Partition-deed.

When an application is made to court to file an award, it has no power to amend the award or remit it for the reconsideration of the arbitrators, when it is

defective on the face of it, and determines matters not referred to arbitration and is so indefinite as to be incapable of execution.

Obiter. An award purporting to partition immoveable property over Rs. 100 in value and signed by the parties signifying acceptance does not require registration.

Held, that a memorandum of appeal against an order rejecting an application to file an award under section 525 of the Civil Procedure Code is chargeable with a Court fee of Rs. 10 under Article 17 of second Schedule of the Court Fees Act, 109 P. L. R., 1902 *dissented from*.

Miscellaneous first appeal from the decree of Pandit Joti Parshad, District Judge, Jhang, dated 30th August 1906.

Mr. Nanak Chand, Advocate, and Rai Sahib Sukh Dial, Pleader for Appellants.

Messrs. Harkishen Singh, and Bahadur Chand, Advocates for Respondents.

JUDGMENT.

SHAH DIN, J.—(19th March 1907.)—This is an appeal from an order rejecting an application under Section 525, Civil Procedure Code, to file an award of arbitrators privately appointed by the parties. The memorandum of appeal bears a Court-fee stamp of Rs. 10. The pleader for Paras Ram, respondent, urged, as a preliminary objection to the hearing of the appeal, that the order appealed against being a decree, the memorandum of appeal must bear an *ad valorem* stamp under Article I of Schedule I of the Court-fees Act, calculated on Rs. 20,000, which is stated to be the amount or value of the subject-matter in dispute. The authorities which were relied upon in support of this objection are *Hari Mohan Singh v. Kali Prasad Chaliha*, I. L. R., XXXIII Cal., 11 and an unpublished decision of this Court, *Firdaus Khan v. Dare Khan*, 109 P. L. R., 1902, (Civil Appeal No. 990 of 1897, decided on 26th November 1901 by Anderson and Harris JJ.). The appellants' pleader, on the other hand, cited the following decisions in support of his position.

Lurkhur Chaube v. Ram Bhajan Chaube, All. W. N. (1903), 214, and *Nand Lal v. A. Atkinson* (Civil Appeal No. 989 of 1903), decided on 8th April 1905 by Chatterji and Kensington, JJ.).

Now the decision in *Hari Mohan Singh v. Kali Prasad Chaliha*, I. L. R., XXXIII Cal., 11, does not appear to us to be applicable to a case like the present. There the appeal was not from an order rejecting an application under Section 525, Civil Procedure Code, as in this case, but from an order passed under Section 526 directing the

award to be filed in Court, and the decree passed in accordance with the award was "in terms to the effect that the plaintiff is to recover the sum of Rs. 3,248 and odd as awarded by the arbitrators." In that case, therefore, the amount or value of the subject-matter in dispute in appeal was the sum of Rs. 3,248, and the memorandum of appeal was held to be governed by Article I of Schedule I of the Court-fees Act. The ruling of this Court in *Firdaus Khan v. Dare Khan* no doubt supports the respondents' contention, but it will be observed that the learned Judges who decided that case followed *Dharm Das v. Ajudhia Pershad* 70 P. R., 1881, which is analogous to the Calcutta case cited above, and is not, therefore, directly in point. The following passage in the judgment in *Dharm Das v. Ajudhia Pershad*, 70 P. R., 1881 embodies the *ratio decidendi* :—

"We find that the award of the arbitrators filed by the order of the first Court, and in terms of which that Court passed judgment and decree, has awarded to the plaintiffs-respondents, the applicants in the first Court, property shown in the decree to be of the value of Rs. 1,45,200, and the object of the appeals preferred by the appellant is to have this decree set aside. This much property then at least was in dispute on the appeal to the Commissioner and in dispute in this Court, even if it cannot be said that the whole property which forms the subject-matter of the award is in dispute, a point which we do not decide. * * * In the Commissioner's Court and in this Court Rs. 1,665 should have been paid in addition to Rs. 10, and under Section 12, clause 2, of the Court-fees Act, that amount must now be required from the appellant in that Court and the same sum in this Court * * * before the appeal can proceed." It will thus be perceived that the ground upon which this Court in the last cited case held that Article I of Schedule I of the Court-fees Act governed the memorandum of appeal before it and that it was chargeable with an *ad valorem* Court-fee, was that the amount or value of the subject-matter in dispute in appeal was the value of the property, *vis.*, Rs. 1,45,200 which the decree of the first Court passed in terms of the award of the arbitrators had awarded to the plaintiffs-respondents, and that the relief sought in the appeal was to have that decree reversed. That decision, therefore, like the Calcutta decision above referred to, does not seem to be applicable to a case like the present, in which the application to file the award under Section 525, Civil Procedure Code, has been rejected, and consequently no decree has been passed in terms of the award at all. The relief sought in the appeal before us is

not the reversal of a decree awarding specific property of a definite money value to the respondents, but simply an adjudication upon the appellants' right to have the award of arbitrators filed in Court under the provisions of Chapter XXXVII of the Code of Civil Procedure. The subject-matter in dispute in this appeal, therefore, is one which it is impossible to estimate at a money value, and hence clause VI of Article 17 of the second schedule to the Court-fees Act would seem to apply to this memorandum of appeal.

Another consideration which, in our opinion, very much weighs against the contention of the pleader for the respondent is this:—Suppose this appeal is dismissed and the application under Section 525, Civil Procedure Code, to file the award stands rejected, it would be open to the present appellants to bring a regular suit to enforce the award. The plaint in such a suit, if one were brought, would bear an *ad valorem* stamp, and the appeal arising out of that suit would have to be similarly stamped. If this be so, can it be reasonably contended that it was within the contemplation of the legislature that an appeal from an order rejecting an application under Section 525, Civil Procedure Code, which was clearly intended to provide a simple, cheap, and expeditious process for making a private award a rule of Court, should be treated, in regard to the question of the Court-fee leviable thereon, on precisely the same footing as an appeal arising out of a regular suit brought under the ordinary provisions of the law to enforce such an award? According to this contention the party who seeks to enforce an award made out of Court in the first instance by availing himself of the summary remedy provided in Chapter XXXVII of the Civil Procedure Code, and, failing therein, by a regular suit, will have to pay on his memorandum of appeal an *ad valorem* Court-fee twice over. This, surely, could not have been intended by the legislature, especially when we find that an application under Section 525, Civil Procedure Code, though it must be numbered and registered as a suit and is for all practical purposes treated as a plaint, is only liable to a Court-fee stamp of As. 8 as an application and not to an *ad valorem* stamp as a plaint in a regular suit.

In *Nand Lal v. Atkinson* (C. A. No. 989 of 1903) this Court has decided that an appeal from an order refusing to file an agreement to refer to arbitration upon an application made under Section 523, Civil Procedure Code, is sufficiently stamped, if it bears a Court-fee of Rs. 10. This decision, though not directly applicable to the present case, is in

point, in so far as it lays down that the order appealed from is a "decree," but that the appeal is not liable to an *ad valorem* Court-fee, simply because it is an appeal from a decree and not from an order. The ruling of the Allahabad High Court in *Lurkhur Chaube v. Ram Bhajan Chaube* is a direct authority in support of the appellants' position. Upon a careful consideration of the authorities, then, we hold that the appellants' memorandum of appeal, which bears a Court-fee of Rs. 10 is sufficiently stamped, and we overrule the respondents' preliminary objection accordingly.

On the merits of the appeal the questions for determination are: (1) whether the award of arbitrators, dated the 15th of November 1905, requires registration, and not being registered is inadmissible under Section 49 of the Registration Act; and (2) whether the award in question is open to objection on any of the grounds mentioned or referred to in Section 520 or Section 521, Civil Procedure Code, and cannot therefore be ordered to be filed. As regards the first question, the contention for the respondent was that the award which has effected a division of joint family property, having been signed by the parties to signify their acceptance of the award, must be treated as an instrument of partition, and its registration was compulsory under Section 17, Indian Registration Act. In the view which we take of the merits of this case, it is unnecessary to discuss and decide the point of law thus raised, though we may note that the present inclination of our opinion is that the award in question was not compulsorily registrable under Section 17, nor was it inadmissible under Section 49 of the Act, both because awards of all descriptions are exempted from registration under clause (2) of Section 17, and because in making an application under Section 525, Civil Procedure Code, the present appellants did not seek to enforce their title to immoveable property and tender the award as evidence of that title (as might be the case if a regular suit were brought to enforce an award), but merely asked the Court to file the award, which was at the time in possession of the arbitrators, and to make it a rule of Court.

As regards the second question, we are of opinion, after hearing arguments on both sides and referring to the record, that the award is defective and unenforceable, and should not be ordered to be filed. The grounds urged in support of the conclusion come to by the Court below and which have, we consider, been made out upon materials before us, are—

(a) that the arbitrators did not effect a complete partition of the

joint family property held by the four brothers who are parties to this appeal ;

(b) that the arbitrators exceeded their powers in deciding matters not referred to them ; and

(c) that the award is so indefinite as to be incapable of execution.

As regards (a), the agreement, dated 15th November 1905, recites that there is a dispute among the brothers, parties to the agreement, in regard to the partition of the property, moveable and immoveable, which their father, Chaudhri Jagta Ram, has made over to them, and which they hold jointly ; that Jagta Ram has set apart a portion of his estate for his own use and enjoyment ; and that they refer the matter of the partition of the joint property with the exception of the property left in the hands of Jagta Ram (which is set out in detail in the agreement) to two arbitrators who are named in the agreement. Provision is also made for reference to an umpire (Lala Sobha Ram) in case of a disagreement between the arbitrators. The whole joint property in possession of the brothers was to be divided into four equal shares by lots.

The arbitrators made the award on the same day on which the agreement was executed, and it appears from evidence of the arbitrators and the statements of the brothers upon the record that the arbitrators did not take the trouble to ascertain the details of the property, moveable and immoveable, in the possession of each brother, but contented themselves with taking from the parties four incomplete lists of the joint property which they had prepared beforehand and casting lots on the basis of these lists without equalizing the parties' respective shares in accordance with a definite principle of valuation. Admittedly all cash and jewellery in possession of the parties were excluded from the award, and no attempt at all was made to find out their amount or value by sending for and examining parties' books, which the arbitrators state the parties declined to produce. A comparison of the three lists on the record with the details of the property as given in the award also discloses discrepancies which, though not very material, at least show that the award was not the result of mature deliberation and a full enquiry as to the details and amount of the property which the arbitrators were asked to divide. We are therefore, constrained to hold that the award was defective on the ground that it failed to make a complete partition of the joint property which the arbitrators were appointed to divide.

As regards (b) a reference to the award shows that the arbitrators exceeded their powers in giving a decision in respect of at least two

matters which were not referred to them by the agreement. In the first place, the award, after referring in detail to the property which under the agreement was left in the hands of the father, and which was expressly excluded from the cognizance of the arbitrators (who were appointed only to partition joint property held by the brothers) decides that the father "shall have free power of disposition with regard to this property uncontrolled by the sons, no matter whether the transfer be made to one of the sons in consideration of services rendered by him or to a stranger." In the second place, the award declares that certain residential houses in possession of the brothers separately shall remain the joint property of the parties for the present, that they shall be divided among them within six months, but that if not so divided within the said period, each brother shall be entitled to recover, from such of the others as may be liable, the value of the improvement, if any, which he may be found to have effected in respect of the house or houses in his possession. We are clearly of opinion that in deciding these two matters in the way they did, the arbitrators exceeded their powers, which were expressly limited by the agreement under which they had been appointed to the partition of the joint estate of the parties, and that this being so, the award in question must be held to be one which is incapable of being filed. For it is not seriously denied that in these proceedings, which have been initiated by an application under Section 525, Civil Procedure Code, to file an award, the Court has no power to amend the award or to remit it for reconsideration, but must either affirm it in its entirety or wholly reject it. (See *Mustafa Khan v. Phulja Bibi*, I.L.R., XXVII All., 526, and *Miran Bakhsh v. Rahim Bakhsh*, 18 P. R., 1892.

With regard to the last point (c), it needs only to read the award to see that the partition of the joint property of the parties has been effected therein in such an ill-defined manner that if the award were ordered to be filed and a decree passed in terms of the award the identification of the property, which has been allotted to each brother as his share, would be attended with manifold difficulties, and we are, therefore, constrained to hold that the award is so indefinite as to be incapable of execution.

For the foregoing reasons we maintain the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 185.

CIVIL

Before Mr. Justice Johnstone.

KESAR DEVI.—(DEFENDANT),—APPELLANT,

versus

PARTAP SINGH, and another,—PLAINTIFFS,—RESPONDENTS.

CASE No. 1847 OF 1907.

Civil Procedure Code (Act XIV of 1882) Section 508—Probate and Administration Act V of 1881) Section 55—Receiver. When may be appointed.

A receiver should not be appointed to take charge of property in the hands of a defendant unless—

- (a) There is a fair probability of the suit succeeding ; and
- (b) there is an allegation that the defendant is wasting or about to waste the property, or is incapable of managing it ; and
- (c) there is some proof of this allegation by affidavit or otherwise.

Miscellaneous first appeal from the order of Bhai Charat Singh, District Judge, Jhelum, dated 22nd October 1907.

Mr. Petman, Advocate for Appellant.

Mr. Gurcharan Singh, Advocate for Respondents.

JUDGMENT.

JOHNSTONE, J.—(9th December 1907).—This is a case of peculiar nature. Plaintiff has asked for probate of a Will of somewhat complicated kind, the main feature of which is that the estate of the testator, amounting, it is said, to some two lakhs of rupees, is to be devoted to *dharmarth*.

The executors were named, both of whom have withdrawn the applications for probate which they presented in Court. In the present petition of plaintiff two plaintiffs are named ; but of them Jowahir Singh has withdrawn and Partap Singh is the real plaintiff.

The testator has left only two relatives, a widow and a daughter. He is a Hindu and, in the absence of a will, these two would be his heirs. The will does not provide for them at all. This is one reason for doubting whether the will can possibly be supported in a Court of law ; and there are other reasons.

Here and there, it may be that certain bequests are clear and certain enough to be enforced, but the bulk of the property is to be used for *dharmarth*,

and it is more than doubtful whether such provisions in a will are capable of being carried out, inasmuch as *dharma* covers an infinity of purposes. Again, plaintiff is nowhere mentioned in the will, but he claims to be one of the *satsangis*, in consultation with whom the executors are to administer the estate.

In my opinion a receiver should not be appointed to take charge of property in the hands of a defendant unless—

- (a) there is a fair probability of the suit succeeding ; and
- (b) there is an allegation that the defendant is wasting or about to waste, the property, or is incapable of managing it ; and
- (c) there is some proof of this allegation by affidavit or otherwise.

Here I can find none of these conditions satisfied. I do not want to pre-judge the suit, and so I will say nothing as to (a) ; but, so far as I can see, the only complaint in regard to defendant's dealings with the estate is that with the help of her father she began to recover debts due to the estate. This was no act of waste ; this and her application for succession certificate were acts of prudential management, then as regards (c) proof there is absolutely none.

I accept this appeal and set aside the order appointing a receiver, which was quite uncalled for. I direct that the Court below do release the property. I understand that the succession certificate case has been hung up by the District Judge. It should be taken in hand at once, and unless some new and insurmountable objection arises, the certificates should be granted to the widow without delay subject to the furnishing by her of security.

Appeal allowed.

REVISION SIDE.

No. 186.

CIVIL

Before Mr. Justice Reid.

MAM RAJ,—(PLAINTIFF),—(APPELLANT)

versus

GOKAL CHAND and another,—(DEFENDANTS)—RESPONDENTS.

CASE No. 480 OF 1907.

Partnership. Dissolution of—Distribution of assets.

Held, that upon the dissolution of a partnership, if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner, the deficiency is a loss of capital and is to be borne or made good by the partners.

Under Section 253 of the Contract Act the share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss, and partners must contribute equally to losses sustained by the partnership. In the absence of a contract to the contrary, the share of loss or profit is ascertained by dividing the total loss or profit by the number of partners.

Petition for revision of the decree of R.B. Lala Mulraj, Divisional Judge, Delhi Division, dated 14th November 1906.

Mr. Gurcharan Singh, Advocate for Petitioner.

Mr. Daulat Ram, Advocate for Respondents.

JUDGMENT.

REID, J.—(24th May 1907).—The point for decision is the procedure to be adopted in accounting on dissolution of partnership.

The lower appellate Court found that Mam Raj, petitioner, contributed Rs. 8,500 capital and had withdrawn Rs. 8,075, and that Gokal Chand, respondent, had contributed Rs. 1,050 capital and withdrawn Rs. 984-9-6, Mam Raj had, therefore, to withdraw Rs. 625, and Gokal Chand had to withdraw Rs. 115-6-6.

The lower Appellate Court further found that Gokal Chand owed the firm Rs. 166-0-9, which more than exhausted his remaining capital. The balance, after deducting Rs. 115-6-6 from 166-0-9, is Rs. 50-10-3 which must be added to the outstandings, which were purchased by Gokal Chand for Rs. 20, Mam Raj having refused to bid.

Under Section 253 of the Contract Act the share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss and partners must contribute equally to losses sustained by the partnership. In the absence of a contract to the contrary, the share of loss or profit is ascertained by dividing the total loss by the number of partners, *Jadobram Dey v. Bulloram Dey*, 1 L. R., XXVI, Cal. 281, and no contract to the contrary has been set up here. The rule laid down in *Benney v. Mutrie*, L. R., 12. App. Cas. (1887), 160 is that if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner, the deficiency is a loss of capital, and is to be borne or made good by the partners.

The assets of the firm consist of the Rs. 200 for which the outstandings were purchased by Gokal Chand, and this sum must be paid to Mam Raj in reduction of the sum due to him for capital. The balance of that sum, viz, Rs. 405, is a loss, to be borne equally by Mam Raj and Gokal Chand. The latter will, therefore, pay to the former Rs. 20 plus Rs. 202-8-0 = Rs. 222-8-0

To this extent the application is allowed. The respondents will pay the petitioner's costs of this Court.

Application allowed.

REVISION SIDE.

No. 187.

CIVIL.

Before Mr. Justice Reid.

NAWAB KHAN and others,—(DEFENDANTS),—PETITIONERS,

versus

SEWA DAS and others,—(PLAINTIFFS),—RESPONDENTS.

CASE NO. 857 OF 1907.

Punjab Tenancy Act (XVI of 1887) Section 77 (3), (d)—Jurisdiction of Civil and Revenue Courts—Suit for declaration of Mokarraridari rights.

Held, that a suit for declaration of Mokarraridari rights is cognisable by a Civil Court and not by a Revenue Court.

Petition for revision of the order of H. Scott-Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 10th November, 1906.

Mr. Duni Chand, Advocate for Petitioners.

JUDGMENT OF THE DIVISIONAL JUDGE.

This was a suit by the plaintiff for a declaration of his *mukarraridari* rights in certain land, khasra Nos. 25 and 175.

The defendants appeal.—The first point raised was that the suit was not triable, by a Civil Court, as it fell under section 77 (d) of Act XVI of 1887.

In *Malik Anlia Khan v. Beli Ram* (67 P.R., 1890) the Chief Court held that a *mukarraridar* was only a tenant with a right of occupancy of a peculiarly

exalted kind. In *Maya Dass v. Malik Aulia Khan* 10 P.R., 1896, (Rev.) the Financial Commissioner held that a *mukarraridar* in the Rawalpindi District was a tenant, but there was a difference between his status and that of an ordinary tenant with a right of occupancy. An ordinary tenant with a right of occupancy means one under Act XVI of 1887, and I gather from the ruling that a *mukarraridar* is not an occupancy tenant to whom the provisions of that Act apply. I think, then, that the case was triable by a Civil Court." The defendants made application to the Chief Court on the Revision side. The following ruling was passed :—

REID, J —(13th May 1907).—On the authorities cited by the learned Divisional Judge and *Malik Aulia Khan v. Beli Ram* 67 P. R., 1890, cited by counsel the Civil Court has jurisdiction. The fact that a *mukarraridar* is a tenant, not a sub-proprietor does not necessarily make Section 77 of the Tenancy Act applicable to this suit and in *Maya Dass v. Malik Aulia Khan* 10 P.R., 1896, (Rev.) it was held that *mukarraridars* were not governed for purposes of succession by the Tenancy Act. I dismiss the application.

Application dismissed.

APPELLATE SIDE.

No. 188.

CIVIL.

Before Mr. Justice Reid.

FAQIR MUHAMMAD and others,—(PLAINTIFFS),—APPELLANTS,

versus

MIRAN BAKHSH,—(DEFENDANT),—RESPONDENT.

CASE NO. 599 OF 1907.

Custom—Muhammadan Law—Succession—Dower—Succession to the unpaid dower of a deceased female.

Held, that the parties were governed by Muhammadan Law on the matters of succession to the unpaid dower of a deceased female, even if it were shown that they were governed by Customary Law in matters of succession generally.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Ambala Division, dated 20th November, 1906.

Mr. Sham Lal, Advocate for Appellants.

Mr. Vishnu Singh, Advocate for Respondent.

JUDGMENT.

REID, J.—'18th July 1907).—Assuming, for the sake of argument, that the parties are governed by Customary Law in matters of succession generally, they are, in my opinion, governed by Muhammadan Law in the matters of succession to the unpaid dower of a deceased female. The only evidence relied on in support of the finding to the contrary of the lower Appellate Court is contained in the depositions of four witnesses; for the defendant-respondent that the parties are governed by custom, under which the woman's heirs do not get her dower. Not a single instance has been cited by these witnesses; and, as remarked by Chevis, J., in Civil Appeal 174 of 1907, decided on the 18th May last, the *Riwaj-i-Am* of both the Ludhiana and Jullundur districts is silent on the point. At page 50 of the Ludhiana Customary Law it is stated that in this "matter of dower there is no local or tribal custom."

In *Daya Ram v. Sokel Singh* 110 P. R., 1906 (F B.) (1), it was held that among parties ostensibly governed by Customary law, it is permissible to fall back as a last resort on their personal law for the decision of the point in issue where no definite rule of Customary Law applicable to the case before the Court can be found. As remarked by Chevis, J., in the judgment above cited, dower is one thing; the life interest which a widow holds in her husband's estate is quite another. No general rule of Customary Law on the point has been cited, and I have not found any such rule. For these reasons I hold that the suit must be decided on Muhammadan Law.

I decree the appeal, set aside the decree of the lower Appellate Court, and remand the appeal under Section 562 of the Code of Civil Procedure for decision.

Court-fee on the memorandum of appeal to this Court will be refunded and costs will be costs in the cause.

Appeal allowed.

APPELLATE SIDE.

No. 189.

CIVIL.

Before Mr. Justice Shah Din and Mr. Justice Kennington.

JHANDAD KHAN and others (DEFENDANTS),—APPELLANTS,

versus

ABBAS KHAN, (PLAINTIFF)—RESPONDENT.

CASE No. 240 OF 1907.

Jurisdiction of Civil and Revenue Courts—Suit for declaration that plaintiff had muqarraridari rights in land—Registration Act (111 of 1877) Section 17 (d)—Lease—Documents constituting perpetual lease.

The plaintiff sued for a declaration that he had *muqarraridari* rights in the *shamilat* of a village created by deeds executed by or on behalf of the proprietary body who owned the *shamilat*.

Held, (1) that the suit was cognizable by Civil Court.

(2) that the deeds constituted perpetual lease and not being registered were not admissible in evidence,

(3) that the deeds could not bind those owners who did not join in its execution and that the suits must be dismissed.

Further appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 4th February 1907.

Messrs. Nanak Chand and Roshan Lal, Advocates for Appellants.

Bhagat Ishar Das, Advocate, for Respondents,

JUDGMENT.

SHAH DIN AND KENSINGTON, J J.—(30th October 1908).—The facts are fully stated in the judgments of the lower Courts. The plaintiff, basing his claim on 2 unregistered deeds, dated 12th January 1894 and 8th July 1895 sued to obtain a declaration that he had *muqarraridari* rights in 4 *kanals*, 7 *marlas* of land situate in *taraf* Wardak of village Nartopa. The land in dispute is admittedly part of the *shamilat* of *taraf* Wardak and the plaintiff claimed *muqarraridari* rights in respect of it on the ground that he acquired them by virtue of the 2 deeds of 1894 and 1895, which he alleged to have been executed in his favour by or on behalf of the proprietors of *taraf* Wardak who own the *shamilat* land appertaining to it.

The Court of first instance held that the plaintiff had failed to prove that the above mentioned deeds, which purported to transfer *muqarraridari* rights in his favour, had been executed by *all* the co-sharers in the *shamilat*

of Wardak, and finding that the execution of the said deeds by only some of the co-sharers was not binding on the others and therefore did not confer *muqarraridari* rights in the land in dispute on the plaintiff, dismissed his suit.

On appeal, the Additional Divisional Judge found that both the deeds in question were genuine, that the deed of 1894 had been ratified by that of 1895, that none of the proprietors of Tarn Wardak had taken steps to get them cancelled, that the *Lambardars* had been realizing rent due under the said deeds from the plaintiff, and that the plaintiff had been in possession of the land ever since 1894. He further held that it was for the defendants to show that some, and if so which, of the proprietors of Wardak had not joined in the execution of the deeds of transfer of *muqarraridari* rights, and finding that they had failed to discharge the onus, decreed the plaintiff's claim. The defendants appeal to this Court, and on their behalf Mr. Nanak Chand has contended—

(1) That the suit is one cognizable by a Revenue court and not by a Civil Court.

(2) That the deeds of 1894 and 1895 required registration, and not being registered were inadmissible in evidence.

(3) That it was for the plaintiff to prove that all the co-sharers in the land in suit had joined in the transfer in question or at any rate were bound by it, and that as he has failed to do so, his claim should fail.

After hearing arguments on both sides, we think that the 1st contention is not tenable, but that the 2nd and 3rd contentions must prevail.

The question as to whether the plaintiff's suit was or was not cognizable by a Civil Court, was made the subject of a rather lengthy discussion by the appellants' Counsel, but after giving our best consideration to it, we are of opinion, following No. 42 P. R. 1908 (1) and in view of the observations of the Full Bench in No. 33 P.R. of 1908 (2, set out at p. 203 of the report, that the suit was rightly taken cognizance of by the Civil Court.

As regards the 2nd contention, it seems to us that the deeds of 1894 and 1895 on their proper construction clearly constituted a perpetual lease of agricultural land, and as such were compulsorily registrable under section 17, clause (d) of Act III of 1877. Not being registered they are inad-

(1) S. C., No. 187 P. L. R. 1908,

(2) S. C., No. 171 P. L. R. 1908 (F.B.)

missible in evidence, and the plaintiff's suit being expressly based upon them must fail.

On the merits also we think that the plaintiff's suit ought to have been dismissed. It is frankly admitted by his advocate that the evidence in support of the execution of the deeds of 1894 and 1895 having been effected by, or on behalf of, all the proprietors of Taraf Wardak is unsatisfactory, but he contends that under the circumstances of the case it was for the contesting defendants to show that they had not authorized the execution of the documents in question, and that they have failed to do so. This argument, however, does not commend itself to us at all. The deed of 1894 is signed only by three, and sealed by two, of the proprietors of Wardak, while the deed of 1895 is sealed by two of them only. That being the case, the said deeds do not and cannot bind such of the proprietors as did not join in executing them, unless the executants had express authority to transfer *muqarraridari* rights to the plaintiff on behalf of the entire body of the co-sharers. Such authority has neither been alleged nor proved, and it must be held, therefore, that the contesting defendants are not bound by the transfer in question.

Mutation of the land in dispute was refused both in 1894 and 1903, and in the *jamabandi* papers the plaintiff has so far been entered as *ghair maurusi*. His alleged status as a *muqarraridar* under the proprietary body of Taraf Wardak has not been established, and we fail to see how he can be declared a *muqarraridar* in respect of the land in dispute *qua* the confessing defendants or such of the proprietors as are shown to have been parties to the deeds on which the suit is based.

For the above reasons we accept the appeal, and reversing the decree of the lower appellate Court dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

REVISION SIDE.

No. 189.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.
HUSSAIN KHAN,—(PLAINTIFF),—PETITIONER,
versus

HIRA LAL AND ANOTHER,—(DEFENDANTS),—RESPONDENTS,
CASE No. 1107 of 1907.

Civil Procedure Code (Act XIV of 1882), Section 26—Parties—Partners.

Where the plaintiff's partner claimed to be made co-plaintiff with the plaintiff, but the latter refused to join him and the suit was dismissed.

Held, that the order of dismissal was right.

Petition for revision from the order of the Divisional Judge, Ambala Division, dated the 26th December 1906.

Lala Dwarka Das, Pleader for Petitioner.

Bhagat Ishar Das, and *Rai Sahib Lala Sukh Dial*, Advocates, for Respondents.

JUDGMENT.

CLARK, C. J. (12th November 1908).—Plaintiff's case was based on the liability of defendant Hira Lal to him alone. Hira Lal based his defence on the ground that Mitter Sen was plaintiff's partner, and that plaintiff could not sue alone. Mitter Sen, agreeing with this defence, made application to be made co plaintiff. Plaintiff objected, and Mitter Sen was then made co-defendant.

Both Courts have found that plaintiff and Mitter Sen were partners, and thus plaintiff's case was based on a false allegation.

The question is whether plaintiff's suit has been rightly dismissed because of his not joining Mitter Sen with him as co-plaintiff.

The Courts have relied upon *P. R.* No. 86 of 1891, No. 56 of 1901, *S. C.*, 94 *P. L. R.*, 1901, and No. 67 of 1906, *S. C.*, 88 *P. L. R.*, 1907, which are I think very much in point.

Plaintiff's counsel before me has relied upon *P. R.* No. 127 of 1906, *S. C.*, 58 *P. L. R.*, 1907, and *I. L. R.*, XX Bom., 435. In those cases a partner in whose name a bond had been executed was allowed to sue without joining his co-partners.

These are entirely different cases from the present case of a partner alleging that a contract was with him alone, and resisting the claim of a partner who wished to sue along with him. In them the joining of the co-partner was a mere formal procedure, in this case the main bone of contention was whether the debt was the plaintiff's sole debt, or the debt of the partnership.

The same fact distinguishes this case from *I. L. R.*, XXVI Cal., 409; XXIV All., 226; XXIX Mad., 802, in which the point was that it was

sufficient for plaintiff to have made a partner a co-defendant it was not necessary to show that he had refused to become a co-plaintiff.

Here it is the partner who wished to become a co-plaintiff, which plaintiff refused to allow.

Plaintiff's counsel also relied upon passages in the judgment of Sir M. Plowden in *P. R.* No. 156 of 1889. In *P. R.* No. 86 of 1891 Sir M. Plowden distinguished that case by pointing out that in that case there was an allegation in the plaint of a promise to plaintiff and others, who were not joined as partners, while in the No. 86 case, as in the present case, plaintiff sued on a promise to himself alone, while defendants alleged a promise to plaintiff and others. He held that the Courts having found against plaintiff's allegation the suit had rightly been dismissed.

I think that this suit has been rightly dismissed, and I dismiss the revision with costs. Plaintiff will pay costs of pleaders of both respondents, Rs. 32 each.

Petition dismissed.

APPELLATE SIDE.

No. 190.

CIVIL.

Before Mr. Justice Kensington and Mr. Justice Shah Din.

KHUSHAL SINGH,—(PLAINTIFF),—APPELLANT,

versus

JAIMAL, AND OTHERS—(DEFENDANTS),—RESPONDENTS.

CASE No. 352 OF 1906.

Muhammadian Law—Marriage—Legitimacy—Acknowledgment of parentage—Alienation by a Sikh Jat in favour of issue from a Muhammdan woman—Declaratory suit to set aside alienation—Dismissal of suit—Appeal by some only of the plaintiffs.

The Muhammdan Law of acknowledgment of parentage with its legitimizing effect has no reference whatsoever to cases in which illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relating to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved.

In other words the doctrine applies only to cases of uncertainty as to legitimacy and in such cases acknowledgment has its effect ; but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

Held, that a gift of immoveable property by a Sikh Jat in favour of his sons by a Muhammadan wife before the alienor embraced Muhammadanism was void as the alienees could not be regarded legitimate issue.

Held, also, that where claim of reversioners to set aside an alienation is dismissed and only some of them appeal on their own behalf only, the appellate court, if it accepts the appeal, should only grant declaration as to the right of the appellants and not the reversioner who did not join in the appeal.

Further appeal from the decrees of the Divisional Judge, Lahore Division, dated the 26th February 1906.

Messrs. Oertel and Nanak Chand, Advocates, for appellants.

Mr. Dhan Raj Shah, Advocate for respondents.

JUDGMENT.

KENSINGTON AND SHAH DIN, JJ.—(24th October 1908).—The suit out of which this appeal has arisen was brought by 7 plaintiffs, sons of Bela Singh and Dewa Singh, (whose names are set out in the pedigree printed as part of the judgment of the first court at page 4 of the paper book) for declaration that the oral gift made on 2nd May 1901, as evidenced by the mutation of 2nd June 1901, by Nihal Singh, defendant No. 4, in respect of his ancestral land in favour of his illegitimate sons, defendants Nos. 1 to 3, shall not affect the plaintiff's reversionary rights in the said land. The principal defendants, the donees, pleaded *inter alia* that the donor, Nihal Singh, though originally a Sikh by religion, had embraced Islam very many years ago, that they were his sons by his Muhammadan wife, *Mussammat Rajji*, that the plaintiffs were not the reversionary heirs of the donor, and that under the circumstances of the case the gift was in any case valid. The donor, defendant No. 4, supported the pleas of his sons, the donees.

The first court framed 4 issues on the pleadings of the parties, and found that the land in suit was ancestral, that the plaintiffs were reversioners of Nihal Singh, that defendants Nos. 1 to 3 were the illegitimate sons of Nihal Singh by *Mussammat Rajji*, and that Nihal Singh was not empowered to make a gift of his land in favour of the donees. On these findings the suit was decreed. On appeal by the donees, Labh

Singh, the eldest son of Dewa Singh, filed an application on 2nd December 1905, withdrawing from the suit. The Divisional Judge held that to all intents and purposes *Mussammat* Rajji had all along been the wife of Nihal Singh, though their formal *nikah* was read only after the latter became a Muhammadan ; that since the gift in dispute had been made by Nihal Singh in favour of his sons by *Mussammat* Rajji, the plaintiffs cannot succeed in setting aside that gift in the absence of clear instances of a custom empowering them to do so, and that in any case "it was much safer not to interfere with Nihal Singh's gift." As a result of these findings the plaintiff's suit was dismissed.

The decree of the Divisional Judge, dismissing the suit, seems to have been accepted as correctly settling the rights of the parties by all the plaintiffs except Fateh Singh and Khushal Singh, plaintiffs Nos. 1 and 2 (sons of Bela Singh), who have preferred a further appeal to this Court, impleading the other plaintiffs as respondents. One of these respondents, Mangal Singh (original plaintiff No. 4) is employed, it appears, in Uganda, and though he was properly served with notice of hearing in this Court on 13th July 1908, he has applied through his Commanding Officer for adjournment of the case till after April 1910. As he has not appealed from the decree of the Divisional Judge, and has only been impleaded as a formal respondent by plaintiffs-appellants Fateh Singh and Khushal Singh, who have appealed not under section 544 C. P. C. on behalf of all the original plaintiffs, but only on their own behalf contesting the correctness of the decree of the lower appellate Court, so far as it affects their own rights of reversion in the estate of Nihal Singh, we have not granted the adjournment prayed for by Mangal Singh.

On behalf of the 2 plaintiffs-appellants, Mr. Oertel has contended that as *Mussammat* Rajji was the wife of Ida, and had never been divorced by him, the union of Nihal Singh with her, whatever its exact nature may have been, was not lawful, and the issue of such union must be held to be illegitimate under the Muhammadan Law, and that even supposing Ida had divorced *Mussammat* Rajji before Nihal Singh contracted an intimacy with the woman, the defendants who had been born *before* Nihal Singh became a Muhammadan could not under their personal law be legitimized by reason of acknowledgment of parentage on the part of Nihal Singh. After hearing Mr. Dhanraj Shah for the respondents, we think that this contention is correct and must prevail.

The doctrine of acknowledgment under Muhammadan Law is very fully discussed by that learned Muhammadan Jurist, Mahmud J., in *I. L. R.*, *X All.* 289.

At pages 334, 335 of the Report we find the following passage :—

“The Muhammadan Law of acknowledgment of parentage with its legitimatizing effect has no reference whatsoever to cases in which illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible, or by reason of marriage necessary to render the child legitimate being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from disproved. In other words the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.” The view embodied in this passage has been invariably followed in the Indian High Courts, and by our own court, see *I. L. R. XV All.*, 396; *XXIII Cal.* 130 (p. 138); *XXVII Cal.* 801 (p. 805); *87 P. R.* 1898 (p. 302); On the authority of these decisions we must hold that the defendants, who are the issue of an unlawful union between Nihal Singh and *Mussammatt Rajji* (regarded as a union either at the time when *Mussammatt Rajji* was the wife of Ida, or even when she was unmarried, or had been divorced by Ida, but *before* Nihal Singh had embraced Islam) are not the legitimate sons of Nihal Singh. That being so, it is clear that they cannot succeed to the estate of Nihal Singh unless they can show that they are entitled so to succeed under custom or by reason of the gift in dispute having been made in their favour. The gift cannot avail them at all, as we are clearly of opinion that it can only be held valid in this case if it accelerates the succession of the donees to the donor's estate or his heirs. As regards custom, not the slightest attempt has been made to prove it, and we can safely say that if any such attempt had been made, it would hardly have succeeded. The *onus* of proving such a custom lies heavily on the donees, and *No. 87 P. R.* 1898 is authority for the view that such *onus* cannot be discharged by adducing evidence of an ordinary character.

For the foregoing reasons we think that the gift in dispute is not [valid, and it follows that the decree of the lower appellate court cannot

be allowed to stand. We have next to consider what decree should be passed in the peculiar circumstances of the case. As we have seen above, the decree of the lower appellate court has been accepted as final by all the original plaintiffs, except two of them, *viz.*, Fateh Singh and Khushal Singh, who alone have appealed to this court. Under ordinary circumstances, no doubt a declaratory decree in favour of some of the reversionary heirs of a proprietor enures for the benefit of all the heirs at the time when the succession opens out, as laid down in No. 24 *P. R.* 1906, *S. C.* 96 *P. L. R.* 1906; but it is recognised in that very decision (*see* p. 92 of the report) that there may be "special causes in any particular case" which would preclude the applicability of the general rule to it.

We think therefore that in the circumstances of the case we are justified in passing the following decree:—

We accept the appeal, and modifying the decree of the lower appellate court, grant the plaintiffs-appellants Fateh Singh and Khushal Singh a declaration to the effect that the oral gift made by Nihal Singh in favour of the defendants shall not affect the reversionary rights of the abovementioned plaintiffs in respect of their own half-share in the estate of Nihal Singh. The parties will bear their own costs throughout.

KENSINGTON, J.—(30th October 1908).—I agree entirely with my learned colleague; but in view of the lower appellate court's remark that the plaintiffs are but distant collaterals (5 degrees removed from Nihal Singh) it is as well to further point out that the land in dispute is part of a joint holding owned by plaintiffs and defendants in equal shares. In the first court the property was admitted to be ancestral of the parties (issue 2), and there has been no attempt, even in this court, to assert the contrary. The mere fact that plaintiffs are somewhat remote collaterals has therefore no bearing upon the questions before us. They are clearly entitled to contest the gift by Nihal Singh on the ground of illegitimacy of the donees. I agree that it has been established beyond all reasonable doubt that at the time of their birth, that is before Nihal Singh's conversion to Islam, the donees' parents were unable to effect a valid marriage by reason of the difference of religion. Act XXI of 1850, referred to by the Divisional Judge, does not touch this point, and he also appears to have misunderstood the effect of the ruling in *P. R.* 87 of 1898, though his remarks in regard to both the Act and the ruling are so exceedingly brief that it is not easy to say what inferences he purported to draw therefrom.

Counsel for the defendants-respondents has laid stress on a decision of this court, dated 28th July 1904, in C. A. No. 514 of 1903, as showing that under certain circumstances the divorce of a woman from her previous husband may be fairly presumed as antecedent to a union existing for a very long term with another man. In the present case, however, the crucial point is not whether *Mussammat Rajji* was either married to, or divorced by, *Ida* before her union with *Nihal Singh* began. We must hold that, even if these points are taken to be established in *Mussammat Rajji's* favour, there was still an insurmountable bar to her marriage with *Nihal Singh* until his conversion. It is quite clear that the parties themselves recognized the difficulty and that *nikah* was not performed until after the conversion, that is some time after the birth of the donees. It is therefore open to the collaterals to contest the gift, and the appeal by such of them as have not accepted the decision of the lower appellate court is bound to succeed.

The decree will be as proposed by my learned colleague, that is in favour of what are now the only contesting plaintiffs, to the extent of half the land in suit.

Appeal allowed.

APPELLATE SIDE.

No. 191.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Johnstone.

NUR MUHAMMAD,—(MINOR), THROUGH BUTA,—
(PLAINTIFF),—APPELLANT,
versus

Mussammat AIMNA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 1241 OF 1906.

Guardian and Ward—Muhammadan Law—Compromise by brother on behalf of minor brother—Suit by minor through next friend contesting compromise—Equity.

Where a Muhammadan minor through a next friend impugned a compromise effected on his behalf by his elder brother, who was his *de facto* guardian, without offering to pay benefit received by the minor under the compromise.

Held, that though the brother was not competent under Muhammadan Law to make the compromise, the suit must be dismissed, leaving plaintiff liberty to sue if he is so advised when he attains majority.

Further appeal from the order of Major B. O. Roe, Divisional Judge, Jullundur Division, dated 21st August, 1906, affirming that of Lala

Kesho Das, District Judge, Jullundhr, dated the 28th May 1906, dismissing the claim.

Rai Bahadur Bakhshi Sohan Lal, and Mr. Browne, Pleaders, for Appellant.

Mr. Vishnu Singh, Advocate, for Respondents.

JUDGMENT.

CHATTERJI J.—(8th April, 1907).—The material facts are given in the judgments of the Lower Courts. The plaintiff and his brothers are the next reversioners of Buta, deceased, the original owner of the disputed land. After Buta's death, the property left by him was recorded in the names of his two widows, and on the death of *Mussammat Umri*, one of them, in the sole name of the other *Mussammat Aimna*. In 1894 the plaintiff's brothers, on his behalf as well as for themselves, came to an arrangement with *Mussammat Aimna*, by which she surrendered her life estate to them and to one Fauja, the sister's son of her husband, in the proportion of one-third and two-thirds, and Fauja took upon himself to pay Buta's debts amounting to Rs. 300 and to maintain *Mussammat Aimna*. This was recorded in the Revenue papers and is said to be the result of a village *panchayat*. Plaintiffs and their brothers are in the enjoyment of their one-third share of land, but as the plaintiff was, and still is, a minor, his brother-in-law, as his next friend, has brought the present suit for a declaration that the widow's alienation of two-thirds of Buta's land in favour of Fauja is bad and does not bind him. He repudiates the right of his brothers to enter into the compromise with Fauja and *Mussammat Aimna*, but does not in his plaint offer to return the benefit he got under it, nor seek to set aside the entire alienation of the widow.

The Lower Courts have dismissed the claim on the ground that the arrangement was, on the whole, a beneficial one for the minor, and that his brothers acted in good faith and with authority. The plaintiff appeals through his next friend and insists that, whether the arrangement is beneficial or not, his brothers had no authority under Muhammadan Law to do any such act as regards his immoveable property. He refers to No. 65 P. R. 1893, a case among the *Gujars* of Hoshiarpur District, like the parties, in which the Muhammadan Law was followed, it being found on inquiry that there was no custom to the contrary.

We are of opinion that there is force in the contention under Muhammadan Law and there was no sifting inquiry into custom. But,

in our opinion, the suit, as laid, ought not to be entertained. The plaintiff is a minor and seeks to repudiate the act of his brothers, who had the right to be, and who actually were, his guardians. He is unable to exercise his own independent judgment as to the merits of the compromise. He certainly cannot avoid it and retain the benefits he received under it. He must return the land he got and pay his proportionate share of Buta's debts. The offer to pay the debt and the surrender of the land are conditions precedent to his bringing the suit. As he did not do these, his suit should not be entertained. His hand moreover ought not to be allowed to be forced by an irresponsible person like his present next friend. The principle is a well known one of equity. We think therefore the suit should be dismissed on the above ground alone, leaving plaintiff liberty to sue if he is so advised when he attains majority and is able to judge for himself.

We accordingly modify the decree of the Lower Courts by dismissing the suit on the above terms. Parties to pay their own costs in this Court.

Appeal dismissed.

APPELLATE SIDE.

No. 192.

CIVIL.

Before Mr. Justice Shah Din.

SOCHET SINGH,—(PLAINTIFF),—APPELLANT.

versus

DIAL SINGH AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 998 OF 1906.

Regulation XVII of 1806, Section 8—Mortgage by way of conditional sale—Foreclosure proceedings—No presumption as to regularity of notice—File of foreclosure proceedings containing notice destroyed.

When the file of foreclosure proceedings containing notice issued to the mortgagor under section 8 of Regulation XVII of 1806 is destroyed, it cannot be presumed that a valid notice had been issued, and the requirements of the Regulation complied with, the facts that a notice had been ordered by the District Court to be issued to the mortgagor, and that on the mortgagor attending the Court he was warned that unless he paid the mortgage-money within one year, no excuse would be listened afterwards were not sufficient to excuse strict proof of the compliance of the requirements of the Regulation.

Further appeal from the decree of W. A. LeRossignol, Esquire, Divisional Judge, Amritsar Division, dated 20th June, 1906.

Mr. Morrison, Advocate for Appellant.

Mr. Fazal-i-Ilahi, Advocate for Respondents.

JUDGMENT.

SHAH DIN, J.—(3rd January, 1907).—The facts are fully stated in the judgments of the Courts below and need not be repeated. The sole question for determination in this appeal is, whether the plaintiff who mortgaged the land in suit by way of conditional sale to the predecessor in interest of the defendants in 1871, has lost his right of redemption by reason of the mortgage having been foreclosed in 1882 under Regulation XVII of 1806.

After hearing counsel for the parties I think that this appeal must succeed. The notice of foreclosure, which is alleged to have been issued to the mortgagor in 1881, is not on the record of the foreclosure proceedings, and the question for decision is whether in the absence of that notice the Court can, in the present suit, presume on the strength of the order of the District Judge, dated 1st August 1881, on the foreclosure file, not only that the notice was served upon the mortgagor, but also that the notice, if so served, complied with all the conditions of foreclosure as laid down in Section 8 of the Regulation. I agree with the counsel for the appellant that no such presumption can in law be made, and that in a suit such as the present, it is for the mortgagee who relies on foreclosure proceedings having worked a forfeiture of the estate of the mortgagor to *prove affirmatively the due performance of every condition* necessary to be established under the Regulation before the foreclosure can attach upon such estate. This proposition is now too firmly established by an unbroken current of published decisions of this Court to need an elaborate discussion, and I consider it therefore sufficient to cite only a few of those decisions in order to show that the position taken up for the appellant is an unsailable one: see *Mussammat Lachmi v. Tota* 16 P. R. 1888, *Kirpa Ram v. Bhagwana* 106 P. R. 1889, *Wasawa Singh v. Kura* 24 P. R. 1895, *Hira Singh v. Sher Singh*, 29 P. R. 1898, *Fazal Ilahi v. Hazari Singh*, 48 P. R. 1902, S. C. 63 P. L. R. 1902, and *Malla v. Rallia, Ram* 71 P. R. 1903, S. C. 162 P. L. R. 1903. The lower Appellate Court remarks that the words of the Regulation have been made quite a fetish of by the Courts in this country, but it overlooks the fact the latter have in this respect only followed (as indeed they were bound to follow) the judicial pronouncements of no less a tribunal than the Privy Council, which has ruled more than once that, in view of the vast importance to the mortgagors of the notification

under the Regulation and of the consequences that follow, it is absolutely essential that all the requirement of the law in regard to foreclosure proceedings be strictly complied with (see *Norendra Narain Singh v. Dwarka Lal Mundor*, I. L. R. III, Cal. 397 (P. C.) and *Madho Pershad v. Gujudar*, I. L. R. XI, Cal., 111 (P. C.) It is somewhat difficult to see how, in the face of the decisions of such high authority, it is open to a court in this country to presume (without affirmative proof by the mortgagee) that the imperative provisions of the Regulation have in a case like the present been satisfied.

The order of the District Judge, dated 1st August 1881, only shows that the plaintiff appeared in person before the Judge. whether after service of notice upon him or otherwise it is impossible to determine, and was warned that if he shall not redeem the land within one year (from what date is by no means clear), he will be precluded from raising any objection (*uzr*) thereafter. Surely it does not follow from this *ex necessitate rei* that the notice that had been issued to the mortgagor was in proper form as to its contents, that it was accompanied by a copy of the mortgagee's petition for foreclosure, and that it bore the seal and the official signature (not merely the initials) of the District Judge. If in any one of these particulars the notice was defective the foreclosure proceedings were bad in law and they do not avail the defendants in this case. Moreover the mortgagee's petition, dated 27th June 1881, does not state that a demand for payment had been made from the mortgagor before the petition was filed, and it is now well established that the omission to make such a demand is fatal to foreclosure proceedings. For these reasons I accept this appeal and decree the plaintiff's claim. The parties will bear their own costs throughout.

Appeal allowed.

APPELLATE SIDE.

No 193.

CIVIL.

Before Mr. Justice Kensington and Mr. Justice Lal Chand, R. B.

DALIP SINGH,—(PLAINTIFF),—APPELLANT,

versus

ISHAR SINGH, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

(CASE No. 300 OF 1906.)

Civil Procedure Code (Act XII of 1882, Section 539—Religious institution—Trust—Suit for dismissal of mahant—Sanction of Collector necessary.

Held, that under section 539 of the Civil Procedure Code sanction of the Collector is necessary before a suit can be instituted for the removal of a mahant

of a *dharmasala* for misconduct and misuse of endowed property. It is immaterial for applying section 539 that the person asked to be appointed in defendant's place on removal be plaintiff himself or another fit person.

First appeal from the decree of D. J. Boyd, Esquire, District Judge, Hoshiarpur, dated 22nd December, 1905.

Rai Bahadur Bakhshi Sohan Lal, Pleader for Appellant.

Mr. Brown, Pleader for Respondents.

JUDGMENT.

LAL CHAND, J.—(13th March 1907).—This is a pauper appeal in a pauper suit dismissed by the Lower Court as unmaintainable without previous sanction obtained under Section 539, Civil Procedure Code. The suit relates to a *dharmasala*, and was instituted by plaintiff-appellant for possession of its office and property by removing defendant 1, who was admitted to have succeeded as *mahant*, but was alleged to have forfeited his right to retain the office and the property owing to misconduct and misuse of endowment property. There was no allegation that the *dharmasala* in suit or the property attached thereto was private property. The plaintiff alleged that the parties, including defendant 2, were *chelas* of the previous incumbent; that on his death, in June 1901, defendant 1 was appointed as his successor and has held the office and property as a *mahant*, but as he has misbehaved since his appointment, plaintiff be appointed as a *mahant* in his place and be placed in possession of the *dharmasala* and of the property attached thereto. The suit as instituted clearly falls within the terms of Section 539, Civil Procedure Code. There is no reason for doubting that the *dharmasala* with its appurtenant property constitutes a trust for public, charitable and religious purposes. The plaintiff alleges that the defendant 1 has committed a breach of such trust by misbehaviour as *mahant* and misusing in debauchery the trust property. He asks for removal of the defendant and for his own appointment as a *mahant* who is a mere trustee of endowed property, *Ramanathan Chetti v. Murugappa Chetti I. L., R. XXIX Mad. 283, P. C.* The view taken by the Lower Court is therefore evidently correct. The pleader for appellant referred to, and relied upon, *Bawa Sukhram Das v. Barham Puri 122 P. R. 1890. Sewa Singh v. Budh Singh 66 P. R., 1892, and Mussammat Monijan Bibee v. Khadem Hussein, IX Cal., W. N., 151*, to support his contention that previous consent under Section 539, Civil Procedure Code, was not requisite in the case. But these were not cases of any alleged breach of trust or of removal of a trustee. *Sukhram Das,*

v. Barham Puri was a suit by a person claiming as the lawful *mahant* for possession of the property of the shrine from a person who was alleged to have dispossessed him of the property. *Sewa Singh v. Budh Singh*, was a suit by worshippers of a *dharmshala* to set aside certain alienations effected by the *mahant*, but there was no prayer to remove him and to appoint a new trustee in his place. *Monijan Bibee v. Khadem Houssein*, was a case of a dispute between rival parties, each claiming to exercise right as *mutualis* over *wakf* property. Not a single authority was quoted where Section 539 was held inapplicable to a suit for removal of the incumbent *mahant*, and appointment of another person in his place on an allegation of a breach of trust. The view we take is further supported by *Sajedur Raja v. Baidyanath Deb I. L. R., XX Cal., 397*, *Sajedur Raja v. Gour Mohan Das I. L. R., XXIV Cal., 418*, and *Sayad Hussain Mian v. Collector of Kaira, I. L. R., XXI, Bom., 49*, quoted in the judgment of the Lower Court. It was attempted for appellant to distinguish these cases by pointing out that the plaintiff in the present suit has asserted his own personal right to be appointed as a *mahant*. But the distinction relied upon appears to us to be altogether immaterial. The relief asked for by plaintiff is defendant's removal as a *mahant* by reason of an alleged breach of trust on his part, and it is evidently immaterial for applying Section 539 that the person asked to be appointed in defendant's place on removal be plaintiff himself, or another fit person. The gist of the suit is to secure a proper administration of trust properties, and the alleged cause of action is a breach of trust by the incumbent *mahant*. Even, in order to secure his own appointment, it is necessary for plaintiff to sue for removal of defendant on an allegation of breach of trust, and he cannot obviously do so without obtaining consent of the Advocate-General as required by Section 539. Section 539, Civil Procedure Code, is therefore clearly applicable and the suit instituted without such consent is palpably unmaintainable. We, therefore, agree with the Lower Court and dismiss the appeal with costs. It may be pointed out that the Lower Court, having dismissed plaintiff's suit, ought to have passed an order under Section 412, Civil Procedure Code, directing the plaintiff to pay the Court-fees which would have been paid by the plaintiff, if he had not been permitted to sue as a pauper. We feel incompetent to correct the omission on appeal filed by the plaintiff, but under Section 592 and 412 we order the plaintiff-appellant to pay the Court-fees which would have been paid by him if he had not been permitted to appeal as a pauper.

Appeal dismissed.

APPELLATE SIDE.

No. 194.

CIVIL.

Before Mr. Justice Kensington and Mr. Justice Lal Chand, R. B.

UMRA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

MUHAMMAD HAYAT AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE NO. 1046 OF 1906.

Evidence Act (I of 1872), Section 112—Evidence—Legitimacy—Child born after marriage.

Where it was contended that a boy born about 7½ months after the marriage of his mother must be considered as illegitimate.

Held, that the contention was not valid.

That the time which elapsed between marriage and birth is altogether immaterial for determining legitimacy. A child born during wedlock is presumed to be the legitimate issue, no matter how soon the birth be after marriage.

Further appeal from the decree of Qazi Muhammad Aslam, C.M.G., Divisional Judge, Ferozepore Division, dated 5th July, 1906.

Mr. Gouldsbury, Advocate for Appellants.

Mr. Mohammad Shafi, Advocate for Respondents.

KENSINGTON & LAL CHAND, JJ.—(11th March 1907).—It is unnecessary to recapitulate the facts in this case which are given in full in the judgments of the Lower Courts. The two points argued in appeal were that Suban was not married to Halim and that Muhammad Hayat, respondent, is not his legitimate son. As regards marriage, the fact was admitted for plaintiffs in the Lower Appellate Court, though denied in the grounds of appeal filed in that Court. It was, moreover, admitted by Shamira, one of the collaterals in the mutation proceedings, which were effected in favour of the respondent Muhammad Hayat in 1900-1901 shortly after death of Halim. Plaintiffs-appellants then took no objection that Suban was not his legitimate son. Muhammad Hayat was not only permitted to succeed to Halim's whole property (300 ghumaos in area) but also allowed to be appointed as a Lambardar in Halim's place under the *sarbarahi* of Shamira, one of the collaterals. The marriage is further supported by oral evidence, which has been credited by the Lower Courts, and the omission to produce the *nikah*

khawan was explained as due to his illness, which is not improbable. The negative evidence produced by plaintiffs against marriage is of no value. Considering their dilatory conduct in instituting the present claim, six years after succession had opened, coupled with their omission to raise any objection at the mutations, we have no hesitation in accepting the concurrent findings of the Lower Courts that Suban was married to Halim. As regards legitimacy it was not denied that Muhammad Hayat is Suban's son. We entirely discredit the evidence produced by plaintiffs to show that he was born before marriage and was brought to Halim's house by Suban. The evidence is opposed to the entry in the village birth register, which shows his birth on 22nd November 1899 in the village of Halim. According to Suban's statement in the mutation proceedings and in the present suit, she was married to Halim in the month of *Phagan* preceding the birth of defendant 1, but even assuming, as suggested for the plaintiffs, that the marriage took place on the 1st of *Baisakh*, i.e., about $7\frac{1}{2}$ months before birth, the time which elapsed between marriage and birth is altogether immaterial for determining legitimacy. As pointed out in Amir Ali's Law of Evidence, at page 671, under Section 112 of the Evidence Act, "So far as concerns descent from particular parents, a child born during wedlock is presumed according to English Law to be the legitimate issue of such parents *no matter how soon the birth be after marriage*. When a man marries a woman whom he knows to be with child, he may be considered as acknowledging by a most solemn act that the child is his. The present section following English Law adopts the period of birth as distinguished from conception as the turning point of legitimacy. It is a peculiarity of that law that it does not concern itself with the conception, but considers a child legitimate who is *born of parents married* before the time of his birth, though they were unmarried when he was begotten." There is, therefore, a conclusive presumption under Section 112, Evidence Act, that Muhammad Hayat, who was born during the continuance of a valid marriage between his mother and Halim, is Halim's legitimate son, irrespective of the question whether he was born six, seven or eight months after such marriage. We accordingly uphold the findings of the Lower Courts that Muhammad Hayat, respondent, is the legitimate son of Halim, and dismiss the appeal with costs.

Appeal dismissed,

REVISION SIDE.

No. 195.

CIVIL.

Before Mr. Justice Chatterji, C. I. E. and Mr. Justice Johnstone.

KIRPA RAM,—(PLAINTIFF),—PETITIONER.

versus

KHUSHALI MAL, AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 1958 OF 1906.

Punjab Pre-emption Act (II of 1905, Local), Sections 12, 13 (2)—Custom—Pre-emption—Shops in villages.

Subject to the provisions of section 12 of the Punjab Pre-emption Act the custom of pre-emption exists in respect of sales of shops in villages, and section 13 (2) of the Punjab Pre-emption Act does not apply to them.

Petition for revision from the order of Lala Karm Chand, District Judge, Gujranwala, dated 7th April 1906.

Mr. Roshan Lal, Advocate for Petitioner.

Lala Dharm Das Suri, Pleader for Respondents.

JUDGMENT.

CHATTERJI AND JOHNSTONE, JJ.—(18th March 1907).—This is a suit for pre-emption of a shop in a village which has been thrown out on the preliminary ground that such suits in respect of shops are barred under sub-section (2), Section 13 of the Punjab Pre-emption Act.

In our opinion this construction is erroneous. In the first place the provision against pre-emption of shops has been inserted in a sub-clause of Section 13 which deals exclusively with pre-emption in regard to urban immoveable property. Ordinarily the presumption would be that the provision was limited by the scope of the section unless indeed the language was distinctly to the contrary purport, in which case it would of course have its full effect. But in such a case the drafting would be open to condemnation as unscientific. A rule of the above description, if it was intended to have general operation, would have been inserted in a section by itself and not made a subordinate clause of one dealing exclusively with urban immoveable property. It is to be noted that the scheme of the Act divides immoveable property which is the subject of pre-emption into two grand divisions, *viz.*, village land and immoveable property, and (2) urban immoveable property, and separately provides rules for claims in respect of each. This is also an essential point to

be borne in construing the Act and in judging the significance of the prohibition against pre-emption of shops, etc., being enacted in a sub-section of a section relating to urban property.

Again, Section 12 provides for pre-emption of land and village immoveable property and the latter expression has been defined in Section 3 (2) to mean immovable property within the limits of a village other than agricultural land. This comprehensive definition would include shops in a village and Sections 13 and 12, and in fact the whole Act should, according to a cardinal rule of interpretation, be construed together.

The only tangible objection to the above interpretation is that *dharmaalas*, mosques, etc., would under it be subject to pre-emption. But buildings of this kind are *res extra commercium*, as Mr. Shadi Lal points out in his Commentary on Section 13, and one can hardly conceive of pre-emption being brought in respect of them. None has been brought in the past. If, however, a special provision was needed for them it would have been made in Section 12, or sub-section (2) of Section 13 might have been made an independent section and worded so as to make it of general application.

This, however, does not affect the question before us. We must construe the Act as a whole, and each section with reference to its subject-matter, unless the language or context is plainly otherwise, and we have no difficulty in arriving at the conclusion that sub-section (2) of Section 13 does not apply to shops in villages, and that the plaintiffs' claim is not barred thereby.

We accept the application and, reversing the decrees of the Lower Courts, remand the case to the Court of first instance to decide it on the merits.

Court-fee on the petition is refunded. Other costs to abide the result.

Application allowed and case remanded.

REVISION SIDE.

No. 196.

CIVIL.

Before Mr. Justice Rattigan.

GHULAM MUHAMMAD, — (PLAINTIFF), — PETITIONER.

versus

JANG BAZ AND THE MUNICIPAL COMMITTEE, JULLUNDUR, —
(DEFENDANTS), — RESPONDENTS.

CASE No. 1340 OF 1906.

Punjab Municipal Act (XX of 1891), Section 120 E, as amended by Punjab Act (III of 1900)—Municipality. Injunction issued by—Jurisdiction of Civil Court.

Held, that although the Civil Courts should not interfere, save on good and substantial grounds, with the orders of local bodies passed in the *bona fide* exercise of the discretionary powers conferred upon them by the Legislature, the Chief Court is bound to see whether the discretionary powers vested in local authorities have been in any particular case exercised *bona fide* and reasonably. But before a Court is justified in interfering, it must find that the order in question was given *mala fide*, or that it was *ultra vires* or oppressive, wanton or altogether unreasonable.

The Chief Court on revision granted an injunction against the defendant Municipality, restraining it from enforcing an order issued to the plaintiff to close a drain which had existed for 25 years, when it appeared that the order was altogether unreasonable and inequitable.

Petition for revision of the order of Captain B. O. Roe, Divisional Judge, Jullundur Division, dated 10th January, 1906.

Mr. Shah Nawaz, Advocate for Petitioner.

Pandit Sheo Narain, Pleader for Respondents.

RATTIGAN, J.—(18th February, 1907).—The Municipal Committee of Jullundur, by notice issued under Section 120 E of Act XX of 1891, (as amended by Punjab Act III of 1900) directed plaintiff to close an old drain and to make arrangements for a new drain along a different alignment. Plaintiff appealed from this order to the Commissioner of the Division; but his appeal was rejected, and he now sues for an injunction to restrain defendants—(who are the said Committee and two other persons)—from giving effect to the directions contained in the notice.

The District Judge, while holding that the Committee acted without *mala fides*, granted plaintiff the relief prayed for on the ground that the "order was not equitable and that it pretends to proceed on alleged "danger to health which is by no means proved." The District Judge further found that the old drain had existed for over 25 years, that plaintiff had acquired an easement in respect of it, and that defendant No. 2 (who is married into plaintiff's family and resides next door) "wants to extinguish that easement, and, finding he cannot do so at law, "shelters himself behind an order of the Committee."

From the order of the District Judge, defendant No. 2 appealed to the Divisional Judge, who accepted the appeal and dismissed plaintiff's suit on the ground that as the Committee in issuing the order under Section 120 E had not been proved to have acted *ultra vires* or *mala fide* or without authority, the Civil Courts had no jurisdiction to entertain the present suit.

Plaintiff applies to this Court to revise this latter order, and on his behalf his learned counsel contends that Civil Courts have undoubted jurisdiction to interfere in such cases when the order of the local authority is unreasonable, malicious, wanton or oppressive. It is contended that in the present instance the order impugned is obnoxious on all those grounds, and that there was no possible justification for the Committee in issuing it. Mr. Shah Nawaz also contends that the Divisional Judge has erred in dismissing the suit without considering whether the order was, or was not, reasonable. In support of his contentions the learned counsel relies upon *Ollivant v. Rahmitulla Nur Muhammad, I.L.R., XII Bom., 474*, at pages 474 and 494; *Damodar Das v. Municipal Committee, Delhi, 27 P. R., 1901*, at page 90; s. c., *P. L. R., 1900*, p. 395; and *Badri Das v. Municipal Committee, Delhi, 90 P. R., 1898*. In reply Mr. Sheo Narain urges that, this being a petition for revision, this Court is bound by the finding of the Lower Courts on the facts; that there is no proof whatsoever that the Committee acted *mala fide* or maliciously; that on the contrary there is evidence to show that the order was issued in consequence of the committee having reason to believe that the existence of the drain was "a menace to health"; that in his plaint the plaintiff made no allegation that the order was oppressive, wanton, capricious or unreasonable, and that the Civil Courts should be chary of interfering with orders passed by local authorities in exercise of the powers conferred upon them by the legislature. The learned pleader cited *Badri Das v. Municipal Committee, Delhi, 90 P. R., 1898*, and *Duke v. Rameswar Malia, I. L. R. XXVI. Cal., 811*, as authorities in favour of his arguments. I quite agree that the Civil Courts should not interfere, save on good and substantial grounds, with the orders of Local Bodies passed in the *bona fide* exercise of the discretionary powers conferred upon them by the legislature. I also quite agree that in cases such as the present the findings of the Lower Courts should (except, again, for substantial reasons) be accepted by this Court when adjudicating as a Court of revision. But, while admitting this, I think

that a Court is bound in all these cases to see whether the discretionary powers vested in local authorities have been, in any particular case, exercised *bona fide* and reasonably. I do not mean to say that the Court is to over-rule the orders of the local authority simply because it may itself consider that the order impugned was unnecessary or open to objection. That is not the true test. Before a Court is justified in interfering it must find that the order in question was given *mala fide*, or that it was *ultra vires* or oppressive, wanton or altogether unreasonable. Very wide powers are given by the legislature to local authorities and with the exercise of these powers, if exercised reasonably, the Courts rightly refuse to interfere. But if in any case the person aggrieved thereby can satisfy the Court that the order was one for which there is on the record no justification whatever, I consider that it is alike the right and the duty of the Civil Court to interpose its authority to prevent the local body from abusing the powers conferred upon it (see *Damodar Das v. Municipal Committee, Delhi*, 27 P. R., 1901, at page 90, S. C., P. L. R., 1900, p. 398). In the present case the District Judge, after himself inspecting the spot, came to the conclusion that the order issued to the petitioner was inequitable and that it pretended to proceed on an alleged danger to health which was in no way proved. As the District Judge further points out in his judgment there can be no doubt that it was owing to the machinations of defendant No. 2, who is inimically disposed towards plaintiff, that the order came to be passed. And that this is so, and that the Municipal Committee are not themselves really interested in this case is, I think, apparent from the fact that the only person who appealed from the order of the District Judge, granting plaintiff's prayer for an injunction, was the said defendant No. 2. The Municipal Committee, who were co-defendants in the suit, accepted the District Judge's finding and order. There is moreover absolutely no trustworthy evidence to show that plaintiff's drain which has been in existence for over 25 years has endangered the health of the public or of his neighbours, and no reason is given by the Municipal Committee for ordering its closure. Under these circumstances I think the District Judge was right in giving plaintiff the relief for which he asked. The Divisional Judge has not attempted to discuss this aspect of the question and has reversed the order of the District Judge simply on the ground that the Committee had not been shown to have acted *mala fide* or *ultra vires*. This is an entirely

erroneous view of the law. A local body may act perfectly *bona fide* and *intra vires* in issuing a certain order; but if that order injuriously affects the rights of any person, the latter can undoubtedly appeal to the Civil Courts for protection, and to that protection he will be entitled if he can prove that the order challenged was made wantonly or without any reasonable justification. In the present case, I can, upon the materials before me, come to no other conclusion than that the Municipal Committee issued the order at the instance of defendant No. 2, and solely for his benefit, and without any proper inquiry as to whether the drain was a menace to health. Had the Committee really been of the opinion that the existence of the drain endangered the health of the petitioner's neighbours or the public, I have no doubt that they would have themselves appealed against the order of the District Judge.

This being the view which I take of this case I have no hesitation in setting aside the order of the Divisional Judge, who dismissed the suit upon the erroneous ground that in such cases the Civil Courts have no jurisdiction to question the orders of the local authorities. The respondent, Jangbaz Khan, must pay the costs of the proceedings in this Court and in the lower Courts.

Application allowed.

APPELLATE SIDE.

No. 197.

CIVIL.

Before Sir William Clark Kt., Chief Judge, and Mr. Justice Reid.

KISHEN CHAND,—(DEFENDANT),—APPELLANT,

versus

TAJ DIN AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 1238 OF 1907.

Punjab Courts Act (XVIII of 1884), Section 40 (1), as amended by Act XXV of 1899.—Further appeal—Valuation—Mortgage—Redemption suit.—Cost of repairs—Additional lien.

In a suit for redemption or payment of Rs. 828 the Court of first instance found Rs. 1,168 due and made redemption conditional on payment of that sum. The lower appellate Court reduced the amount to Rs. 604.

Held, that the value of the property involved in the decree was over Rs. 1,000.

Held, further, that the amount decreed for repairs was as much part of the money payable before redemption as was the actual mortgage consideration due and was therefore involved in the decree.

Held, also, that a document which merely provides that the amount advanced under it must be repaid when the mortgage is redeemed and which does not make payment a condition precedent to redemption does not create an additional lien on the property.

Further appeal from the decree of the Divisional Judge, Amritsar Division, dated the 27th August 1907.

Mr. Sham Lal, Advocate for Appellant.

Mr. Muhammad Shafi, Advocate for Respondents.

JUDGMENT.

CLARK C. J. AND REID J.—(8th November 1908).—Counsel for the respondents objected that the value of the suit was less than Rs. 1,000 and that the decree of the lower appellate Court did not involve directly some claim to, or question respecting, property of like value, and that a further appeal consequently did not lie.

He cited 24 *P. R.*, 1903 (F. B.) (1) pages 76, 77, and 106 *P. R.*, 1895 (F. B.) and 169 *P. R.*, 1888; and Civil Revision 221 of 1903 unreported, *Zamrin of Calicut versus Narayana, I. L. R.*, V *Mad.*, 284 (F. B.); *Vasudeva versus Wadhawa, I. L. R.*, XVI *Mad.*, 326.

The suit was for redemption on payment of Rs. 323. The Court of first instance found Rs. 1,168 due by the mortgagor and made redemption conditional on payment of that sum. The lower appellate Court deducted Rs. 564, consisting mainly of money due under a bond subsequent to the mortgage and interest on that bond. Both Courts included in the amount due Rs. 280-12-9, cost of repairs of the mortgaged premises and excluded Rs. 435 claimed as interest thereon.

24 *P. R.*, 1903 (F.B.) (1) is against the objector. It was held that the words "claim to or question respecting" in section 40 (1) (a) (i) of the Courts Act are very comprehensive and not to be lightly construed against the right of appeal, and that the decree under appeal, and not the amount by which the appellant wishes the pre-emption price to be increased or reduced, has to be considered. We are unable to give effect to the contention that because the lower appellate Court reduced the sum payable on redemption to Rs. 604, that is the value of the property involved in the decree. The fact that the decree of the lower appellate

(1) s. c., No. 35, *P. L. R.*, 1903 (F. B.) pages 154, 155.

Court superseded the decree of the Court of first instance, which the appellant sought to restore, does not alter the fact that a sum exceeding Rs. 1,000 was decreed by the Court of first instance as payable on redemption and is involved in the appellate decree.

106 *P. R.*, 1895 (F. B.) does not help the appellant as the section construed therein was section 39, which differs materially in its language from section 40 (1) (a).

In 169 *P. R.*, 1888 both Courts below had found that the mortgage money due was Rs. 300, the sum specified in the plaint, and it was held that the defendant's plea that Rs. 3,000 were due did not give him a further appeal. The ruling obviously does not help the objector.

In the V Madras case, Turner C. J. and Muttusami Ayyar J., differed from three other Judges composing the Full Bench, who held that the value of improvements was not to be calculated in ascertaining the value of the subject matter of the suit under section 12 of the Madras Courts Act, and no attempt has been made to show that the language of that section was similar to the language of the section now under discussion.

The XVI Madras case does not help the objector, the decree of the Court of first instance having confirmed the allegation in the plaint that a sum within the appellate jurisdiction of the lower appellate Court was due on redemption.

Civil Revision No. 221 of 1903 does not help the objector. It was held therein that there was nothing to show that the value of the land of which redemption was sought exceeded the amount payable on redemption, the case not being one to which the artificial valuation of 30 years' Government revenue was applicable.

We have no hesitation in overruling that part of the objection which is based on the contention that the amount decreed for repairs cannot be included in the jurisdictional value of the appeal. That amount is as much part of the money payable before redemption as is the actual mortgage consideration due and is therefore involved in the decree.

55 *P. R.*, 1890 is directly in point.

16, 19 and 28 *P. R.*, 1908 (F. B.) are against the objector.

The objection is overruled.

On the merits we find no force in the appeal.

The document relied on as creating an additional lien on the property in suit does not, in our opinion, bear that interpretation. It merely provides that the amount advanced under it must be repaid when the mortgage is redeemed and it does not make payment a condition precedent to redemption. Its language differs widely from that of the deed dealt with in 23 *P. R.*, 1900, *S. C.*, *P. L. R.*, 1900, p. 178. The creditor's remedy on failure to pay at date of redemption of the mortgage was by suit for recovery of the amount expressed in the document.

The plea that interest should be allowed on the sum decreed for repairs is directly opposed to 67 *P. R.*, 1893.

The appeal fails and is dismissed.

Parties will bear their own costs of this Court, the preliminary objection having been overruled.

Appeal dismissed.

APPELLATE SIDE.

No. 198.

CIVIL.

Before Mr. Justice Robertson.

AMIR CHAND—(DEFENDANT)—APPELLANT,

versus

DURGA DAS—(PLAINTIFF)—RESPONDENT.

CASE NO. 554 OF 1908.

Civil Procedure Code, (Act XIV of 1882). Section 13—Res-judicata.—Plaintiff declining to proceed with suit.

Where in a previous suit the plaintiff sued *R.* for inheritance of *D.* and the defendant dying during the pendency of the suit, *A.* applied to be made, and was made, a party, but on the plaintiff's statement that he did not wish to proceed against *A.* the latter was absolved from liability—

Held that a subsequent suit against *A.* by the same plaintiff for inheritance of *D.* was barred by *res judicata*.

Further appeal from the order of H. P. Tollinton Esquire, Divisional Judge, Lahore Division, dated the 14th March 1908.

Lala Dharm Das Suri, Pleader for Appellant.

Lala Mehar Chand, Pleader for Respondent.

JUDGMENT.

ROBERTSON, J.—(4th November 1908).—I think it is clear that this suit cannot be maintained.

The present plaintiff first sued Rallia Ram for possession of the inheritance of one Diwan Chand. Rallia Ram died pending the suit and one Kishen Chand was put in as his representative. Kishen Chand collusively confessed judgment and a decree was given against him on 22nd July 1905.

Meanwhile Amir Chand applied to be made representative of Rallia Ram, but this was refused by the first Court.

Amir Chand appealed and succeeded in establishing his right to be made Rallia Ram's representative.

In passing his order the learned Divisional Judge said quite clearly (8th April 1907). "Appellant should clearly be made a respondent in Civil Appeal No. 143 of 1905. Appeal accepted with costs."

Now 143 of 1905 was not the correct number, but this was simply a clerical error which it is clear deceived no one, and which the Judge himself should have corrected on the first opportunity.

The matter came before the first Court again on 18th July 1907; meanwhile a suit had been filed on 2nd April 1907 against Amir Chand and was still pending. This of course is immaterial in this connection.

When the matter of joining Amir Chand came up in the first Court, plaintiff's pleader objected that the appeal had only been accepted as to an interlocutory order (*darmian*) and not on the merits, and that the plaintiff did not desire a decree against Amir Chand "*Amir Chand par decree nahin chatu hai, woh kha makha darkhast harta hai*," and upon this the Court passed the order. "Amir Chand applied to be made a party which was rejected upon plaintiff's objection. Amir Chand appealed. This was accepted and the Court of appeal appointed him to be Rallia Ram's representative, but plaintiff does not wish to proceed against him, nor does he seek a decree against him, so he is absolved from liability for the plaintiff's claim.

("Is waste muakhza mudai se subakdosh kia jata hai")

It is perfectly clear that that constitutes *res judicata* as between Amir Chand and plaintiff, that plaintiff was not, and Rallia Ram was, the heir of Diwan Chand.

There is no getting past that Amir Chand had a decision in his favour, that he was Rallia Ram's representative, he was entitled to have the claim fought out in that suit and plaintiff distinctly said he did not press his claim against him.

The point that Rallia Ram was Diwan Chand's heir and not plaintiff is fatal to his claim in this suit, as it is then immaterial to plaintiff whether Amir Chand is Rallia Ram's heir or not as he has no *locus standi*.

I accept the appeal, and dismiss the suit with cos's throughout.

Appeal accepted.

APPELLATE SIDE.

No. 199.

CIVIL.

Before Sir William Clark Kt., Chief Judge, and Mr. Justice Reid.

BUDH SINGH, AND OTHERS,—(DEFENDANTS),—APPELLANTS.

versus

DEWA SINGH,—(PLAINTIFF),—RESPONDENT.

CASE NO. 702 OF 1907.

Punjab Courts Act (XVIII of 1884), Section 40 (1), as amended by Act XXV of 1899—Further appeal—Valuation—Suit for possession—Defendant setting up mortgage—

Held, that in a suit for possession of land the value of the suit must be taken on the case brought by the plaintiff irrespective of the pleas raised by defendant.

Further appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 16th January 1907.

Mr. Ishwar Das, Advocate for Appellants.

Mr. Sundar Das, Advocate for Respondent.

JUDGMENT.

CLARK, C. J., AND REID, J.—(18th November 1908).—This was a suit for possession of land, of which 30 times the *jama* amounts to Rs. 200. Defendants set up a mortgage of Rs. 2,900, and two Courts have found that there was no such mortgage on the land, and decreed possession. The value of a suit both for purposes of court-fee and jurisdiction must be taken on the case brought by the plaintiff irrespective of the pleas raised by defendant. No authority has been quoted to us which controverts this proposition. *P. R.*, No. 73 of 1899 which is quoted is different, there plaintiff himself alleged the mortgage, and the suit was held to be a suit for redemption. Nor do we think that it makes any difference that the mortgage is entered in the revenue records—it was that entry that plaintiff challenged and which led to the institution of the suit. We hold that no further appeal lies.

As a revision it is urged upon us that as defendants are found to have paid off the previous charges on the land, they have an equitable claim to be repaid before plaintiff is given possession.

This plea was not distinctly taken in the first Court, but it was one which naturally arose on the facts of the case, and one which we think should have been disposed of. The plea was taken before the Divisional Judge, and was rejected by him on the ground that the land now in dispute was not shown to be part of the land redeemed from either Nanak Mall or Gurmukh Singh. There appears, however, to be good reason for holding that the land in dispute is the land that was redeemed.

We think that the following issues should be framed and tried.

1. On the land in suit redeemed by defendants what valid mortgage charge was there due from plaintiff to the previous mortgagees?
2. Is plaintiff equitably bound, before obtaining a decree for possession, to pay defendants the sum found due on issue?

The case is remanded under section 566. Return within 3 months with the opinion of both Courts.

APPELLATE SIDE.

No. 200.

CIVIL.

Before Sir William Clark Kt., Chief Judge, and Mr. Justice Reid.

KADIR BUKHSH,—DEFENDANT),—APPELLANT,

versus

AZIZ MUHAMMAD,—(PLAINTIFF),—RESPONDENT.

CASE No. 926 OF 1907.

Mutation proceedings—Presumption—Burden of proof.

Held, that the mutation in favour of the defendant was surrounded by suspicious circumstances and that he had failed to prove that he was legitimate son of his father.

Further appeal from the decree of the Divisional Judge, Multan Division, dated 30th April 1907.

Rai Sahib Lala Sukh Dial, Advocate for Appellant.

Mr. Muhammad Shafi, Advocate for Respondent.

JUDGMENT.

CLARK C. J., AND REID, J.—(17th November 1908).—This case has been argued at great length before us and the whole of the evidence has been discussed.

The question is whether *Mussammot* Daulat was the lawful wife of Allah Bakhsh (1) and Kadar Bakhsh, defendant, is his legitimate son. Allah Bakhsh died in 1888 and the whole of his land was mutated in favour of plaintiff alone in January 1889.

Mussammot Daulat had been thus living with him for some 5 or 6 years and her son, defendant, was some 4 years old. Allah Bakhsh was a *Kureshi* and she was a *Mullani* woman.

Allah Bakhsh had 2 lawful wives living with him in the village 'abadi' and *Mussammot* Daulat lived at his well said to be some 200 *karams* from the 'abadi.'

Defendant is older than the plaintiff. On Alla Bakhsh's death *Mussammot* Daulat and her son went off to live at her parents' house, and do not appear to have come back to Gujrat (Allah Bakhsh's village) until about 1900 and got nothing out of the estate, and took no steps to assert defendant's title to the estate.

In 1900 Muhammad Yar, uncle, and Ghulam Sarwar, first cousin of plaintiff, were found to be in possession of plaintiff's estate, and they were called upon to account for the profits of the estate which they alleged to be nil. About this very time Alla Bakhsh (2), a cousin of Alla Bakhsh (1), applied on behalf of defendant for mutation in defendant's favour as son of Alla Bakhsh (1). The matter was enquired into by the Tahsildar, and mainly on the evidence of Muhamad Yar, Karori Mall Zaildar, Kundan Mall and Ghulam Rasul (2), Lambardar, defendant was held to be the son of Alla Bakhsh (1), and mutation was sanctioned in his favour along with plaintiff in 1901.

The District Judge permitted the mutation to take place against the interest of the minor under his charge substantially on the report of the Tahsildar which was accepted by Haiat Alli, Nazir, who had been appointed guardian in 1900, when Muhammad Yar was called to account.

In 1905 defendant applied to be put in possession of the land and Haiat Alli resisted this, and it was refused by the District Judge.

Then plaintiff filed this suit with Ghulam Rasul (1) as his next friend. Ghulam Rasul (1) is the son of Muhammad Yar (who only died in 1906), and the interests of father and son appear to be identical. Ghulam Rasul's position in this case is therefore one of extreme delicacy. We find in 1889 his father supporting plaintiff to the exclusion

of defendant—then in 1900 when he is called to account for plaintiff's estate, we find him turning round and championing defendant. Then in filing this suit we find him again championing plaintiff, and when examined before the District Judge on the remand we find him admitting that he did not properly prosecute the case because in consequence of certain arrangements between his father and defendant it was not for his interest for plaintiff to succeed. Under these circumstances we can well imagine that the case was not properly conducted by Ghulam Rasul in behalf of plaintiff.

Of the other witnesses who supported defendant in 1900, we believe Karori Mall to be the real purchaser in 1906 of some of defendant's land for Rs. 1,500 under the name of Vasanda, his Mukhtar.

Kundan Mall is the uncle of this Vasanda. The mutation then of 1900 is in our opinion surrounded by suspicious circumstances.

We think that Daulat's own conduct, her establishment at the well instead of at the house of Alla Bakhsh and the suspicious circumstances surrounding the mutation of 1900, make it incumbent on defendant to prove that she was the lawful wife of Alla Bakhsh (1), and we think that she has failed to do so.

The evidence of an actual marriage is altogether worthless and Alla Bakhsh's treatment of Daulat and her son is in no way inconsistent with her being only his concubine and not his wife.

On the other hand there is a considerable amount of evidence of respectable men to show that Alla Bakhsh was a loose liver and kept concubines, and that *Mussammat* Daulat was only his concubine; also that after Alla Bakhsh's death, the ceremony of *dastarbandi* was gone through with plaintiff. It is hardly possible that this could have been done if defendant, his elder brother, living in the village, had been his legitimate son.

Finding then that *Mussammat* Daulat was not the lawful wife and that defendant was not the legitimate son of Alla Bakhsh (1) we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 201.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din, K. B.

NIGAHIA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

SANDAL KHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 409 OF 1906.

Custom—Alienation by sonless proprietor—Gift to daughter—Bhatti Rajputs of Kharal Kalan village in Jullandhar district and Kharal Khurd in Hoshiarpur district.

Held, that among Bhatti Rajputs of Kharal Kalan and Karnal Khurd villages in Jullandhar and Hoshiarpur districts a sonless proprietor is not competent to make a gift of ancestral property in favor of his daughter in the presence of collaterals of the fifth and third degrees respectively.

Further appeal from the decree of J. G. M. Rennie Esquire, Divisional Judge, Jullundur Division, dated 4th April 1905.

Mr. Harris, Advocate for Appellants.

Pandit Sheo Narain, Pleader for Respondents.

JUDGMENT.

SHAH DIN, J.—(30th March 1907).—In this appeal and in Civil Appeal No. 1095 of 1906 the same question of custom is involved. They were therefore heard together and will be disposed of by one judgment. In this appeal the parties are Rajputs of Bhatti got of Mauza Kharal Kalan in the *Tahsil* of Jullandhar, while in the connected appeal (Civil Appeal No. 1095), they are Rajputs of Mauza Kharal Khurd in the *Tahsil* of Dasuya in the Hoshiarpur District. Both the villages, Kharal Khurd and Kharal Kalan, are inhabited by Rajputs, mostly of the same got, and it is admitted that they are governed by the same rules of custom. In this appeal the dispute has arisen out of one Nigahia having made a gift of his ancestral land in favour of his daughter, Mussammat Jhando, on 17th January 1904, the validity of which gift is contested by Nigahia's collaterals who meet him in the fifth degree from the common ancestor. In the connected appeal the gift in dispute was made by one Gulab Khan to his daughter, Mussammat Imam Bibi, and the plaintiffs who have sued to have the alienation set aside are Gulab Khan's col-

laterals in the third degree. The question for decision, therefore, in both the appeals is whether among Rajputs of Kharal Kalan and Kharal Khurd in the Jullandhar and Hosliarpur Districts, respectively, a sonless proprietor is competent by custom to make a gift of ancestral land to his daughter in the presence of collaterals of the fifth and third degrees.

It is not disputed that the initial burden of proof lies upon the donees, the daughters, in both the cases, and we have therefore to see whether they have succeeded upon the materials before us in discharging that *onus*. The Courts below have found in each case that the *onus* has not been discharged and have decreed the plaintiff's claim.

The *Riwaj-i-ams* of *Tahsil* Jullandhur and *Tahsil* Dasuya practically throw no light upon the point under consideration, and the *wajib-ul-arz* of either village is equally silent upon it. The decision of the question of custom, therefore, turns wholly upon the instances which have been adduced by the parties and further sifted by the local commissioner appointed during the trial of the suit out of which the present appeal has arisen, the oral evidence produced in either case being admittedly of little value. The Court of first instance has, in this case, examined in sufficient detail the instances aforesaid, and as the arguments before us have been limited to a discussion of those instances, we have to see how far they bear upon the question at issue between the parties.

There are altogether seventeen instances, of which Nos. 1 to 8 relate to *Mauza* Kharal Kalan (Nos. 1 to 4 being deposed to by witnesses examined in the Court and Nos. 5 to 8 being brought to light at the local enquiry). Nos. 9 to 12 and No. 17 relates to *Mauza* Kharal Khurd, Nos. 13 to 15 relate to *Rastgo* (which is inhabited mainly by Naru Rajputs) and No. 16 relates to *Mauza* Zahura.

The detail is as follows :—

(1). One Kesar gifted, on 9th June, 1902, 46 *kanals* 1 *marla* of land (out of of 62 *kanals* and $11\frac{3}{4}$ *marlas*) to his daughter without consent of collaterals. No suit has yet been brought. The alienation is very recent and no conclusion can be based upon it.

(2). One Fattah made a verbal gift of 4 *kanals* 1 *marla* out of 30 *ghumaos* (about $\frac{1}{60}$ th of the estate) to his daughter on 15th April 1888,

a son of the donor is alive. No suit brought. The gift was of a very small area and the son appears to have been a consenting party.

(3). Allah Ditta, son of Fatteh (in instance No. 2) gifted on 9th November 1894 $\frac{1}{5}$ th share of 234 *kanals* 10 *marlas* to his sister. No suit brought by collaterals.

(4). This instance is not at all clear.

(5). One Toba made a verbal gift to his sister's sons of about $\frac{1}{50}$ th of his estate on 15th June 1887, in presence of his son. No suit brought.

(6). One Ghausia died in 1866, leaving him surviving two brothers, Kada and Baja, and two daughters *Mussammats* Chando and Bhari. The daughters took possession of Ghausia's estate with the consent of Kada. In 1875 the sons of Baja sued the daughters for possession of their uncle's land, with the result that after two remands for local enquiry the Additional Commissioner of Jullandhur held on 15th July, 1876, that by custom applicable to the parties' tribe the daughters were excluded from inheritance by the nephews of the deceased proprietor and the suit of the latter was accordingly decreed. In the course of enquiry in that case, the plaintiffs seem to have admitted that if their uncle Ghausia had gifted his land to his daughters, they (the plaintiffs) would have had no claim to it. It is this admission of the plaintiffs to the validity of a gift to a daughter which is relied upon by the donee in this case, but obviously a stray admission in an old case which did not touch the merits of the actual dispute between the parties can hardly furnish a good basis for a claim as of right under circumstances attending the present alienation.

(7). One Jiwan gifted his land to his daughter, *Mussammats* Lado, before the present settlement with the consent of collaterals. After the death of the donee, the collaterals succeeded. Not applicable.

(8). Gift to a sister (date unknown) of about $\frac{1}{50}$ th of estate in presence of the donor's children. This instance is of no value.

(9). Before settlement one Gulab Khan made a gift of his land to a daughter and a daughter's son, who had also been, it appears, adopted by the donor. The cousins and cousin's sons of Gulab Khan sued the donees to set aside the gift. The first Court dismissed the suit and the appeal was dismissed by the Additional Commissioner of Jul-

lundur on 12th December 1888. The *onus* was laid upon the plaintiffs to show that the gift was invalid and the decision was based upon some instances (the nature and circumstances of which were not set out in the judgment, a copy of which is on the record) in which gifts to daughters were said to have been maintained among Rajputs of the Jullandhur and Hoshiarpur Districts. It was also found that the daughter's son had been adopted by the donor.

(10). This instance is the subject of dispute in C. A. No. 1095 of 1906.

(11). This instance is said to relate to the succession of two daughters to their father's land, but no particulars are given, and it took place before settlement. The *putwari* states that a suit was brought, but there is no copy of a decision on the file.

(12). One Mandi willed away his property five or six months before the present suit to his daughters. No further particulars.

(13). A gift to a daughter's son 30 years ago. A suit was brought, which ended in a compromise, the donee getting only $\frac{1}{5}$ -th of the land gifted.

(14). This was a gift of $\frac{1}{3}$ rd of the donor's estate to a sister's son before the present settlement in the presence of minor sons. Not of much value.

(15). A verbal gift made about a month before the suit to a sister's son of about $\frac{1}{3}$ th of the donor's land in presence of a minor son.

(16). This is a case of adoption, and hence inapplicable to this case.

(17). A gift to a sister's son was set aside on suit brought by collaterals.

A careful analysis of the above instance serves to show :—

- (1) that in some instances the alienations were of too recent a date to be of much practical value as instances of custom as they may, and in all probability will be questioned and become the subject of judicial investigation ;
- (2) that in others the amounts of the land alienated were too small to arouse any effective opposition on the part of collaterals ;

- (3) that in others again the alienations were made either with the consent of collaterals or in the presence of minor heirs who did not object ;
- (4) that in no single instance in which an alienation was questioned in Court was there a thorough enquiry into the power of a sonless proprietor among the parties' tribe to make a gift to his daughters upon lines approved by the recent decisions of this Court.

It follows, therefore, that in our opinion the donee in the present case, upon whom the *onus* lay, has failed to prove that in the presence of the plaintiffs, who are not shown to be remote collaterals of the donor, the gift in dispute is valid by custom.

Of the published decisions of this Court which have been cited before us in argument none is directly in point. We may, however, note that the following judgments quoted by the learned pleader for the respondents appear to have a bearing upon the question under consideration :—

In *Imam-ud-din v. Wazir Khan* 14 P. R., 1890, it was held that among Muhammadan Bhatti Rajputs of the Gurdaspur District, a sonless proprietor was not competent by custom to sell his ancestral land to his son-in-law with the consent of his collaterals, except for necessity.

In *Suchet Singh v. Binka* 90 P. R., 1891, it was held that there was no custom among Hindu Bhatti Rajputs of the Dasuya *tahsil*, Hoshiarpur District, permitting a proprietor to bequeath ancestral property to near relations in the presence of other near relations. The provisions in the presence of other near relations in the *Riwaj-i-am* bearing upon the question of alienation are fully discussed in this decision.

Sultan Bukhsh v. Mussamat Mahian 46 P. R., 1894, and *Mussamat Lakhon v. Rahmat Khan* 101 P. R., 1895, relate to Ghorewala Rajputs of the Hoshiarpur and the Jullundur Districts, respectively, and lay down that a gift by a sonless proprietor to a daughter is invalid by custom in the presence of collaterals. In the latter decision the collaterals were of the fifth degree.

Amir Khan v. Sardara 110 P. R., 1894, is an important decision relating to Naru Rajputs of the Hoshiarpur District, in which

a large number of authorities bearing upon the question of custom applicable to *Narus* are discussed. The rule laid down is that among Naru Rajputs a gift by a sonless proprietor to a sister's son who is also a collateral is invalid in presence of other collaterals.

In *Umar Khan v. Samand Khan* 145 P. R., 1894, it was held that a sonless proprietor among Naru Rajputs of the Jullandhur District has not an unrestricted power of alienation of ancestral property in presence of collaterals.

The weight of the above decisions, so far as they may be said to be relevant to the present enquiry, is in favour of the plaintiffs-respondents' position, and as the appellants' counsel has been unable to cite to us a single ruling of equal relevancy, we cannot but hold upon the materials before us that the donee has failed to prove that the gift in dispute is valid by custom.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No 202.

CIVIL.

Before Mr. Justice Johnstone and Mr. Justice Shah Din, K. B.

KALU,—(DEFENDANT),—PETITIONER,

versus

PARTA MAL,—(PLAINTIFF),—RESPONDENT.

CASE NO. 19 OF 1906.

Punjab Tenancy Act (XVI of 1887), Section 100—Jurisdiction of Civil and Revenue Courts—Reference to Chief Court—No mistake as to jurisdiction.

When a claim triable by a Revenue Court is heard and dismissed by a competent Revenue Court, the Chief Court is not competent to entertain a reference made under section 100 of the Punjab Tenancy Act by the appellate Court, on the ground that on the facts as proved the plaintiff could have brought a suit on a different cause of action which would be cognizable by a Civil Court, for there is no mistake as to jurisdiction in such a case.

Case referred by R. E. Younghusband, Esquire, Commissioner, Lahore Division, on 9th March 1906.

ORDER OF REFERENCE WAS TO THE FOLLOWING EFFECT.

On the 23rd August, 1890, "Kalu, defendant, executed a mortgage-deed for 10 ghamauns, 5 kanals and 1 marla (wrongly described at

the commencement of the deed as 50 ghamauns, 6 kanale 1 marla without possession) in favour of Parta Mal, plaintiff, for Rs. 400. Defendant agreed to pay Rs. 1-8-0 per cent. monthly interest and hypothecated the land as security for the debt. On the 15th January, 1899, defendant executed a deed described as a "*Kabuliyat*" to the following effect. After referring to the mortgage deed of 1890 the deed goes on to say :— "I have settled up accounts to date. From to-day instead of interest, I have agreed to pay Rs. 72 as '*Malikana*' of the above-mentioned land to the mortgagee. I will pay Rs. 50 in Jeth, 1956 and Rs. 22 in Katak. I have taken the land for one year from Lala Parta Mal for cultivation. After the period (of one year) I will give up the land or execute a fresh agreement." This agreement was on an eight-annas stamp and was not registered.

Plaintiff sued for Rs. 216 as rent for 3 years and for possession of the land, but subsequently struck out the claim for possession. In the first Court defendant admitted execution of both deeds. but pleaded (1) as to the mortgage deed that he had not received any consideration for it, and (2) as to the *kabuliyat* that he did not know the contents of it, and thought it referred to something quite different. The first Court found that whether or no the *kabuliyat* was duly executed by defendant, plaintiff, was not shown as landlord in the revenue papers and was therefore not entitled to sue for rent. The lower appellate Court found that the *kabuliyat* was duly executed by defendant and that in consequence the relation of landlord and tenant existed between them, and that it was immaterial whether mutation of names had been effected or not.

It seems to me that in this case it has not been shown how and when plaintiff became landlord of the land. I am referred to the *kabuliyat* and to Section 116 of the Evidence Act. But that does not solve the difficulty. Section 116 lays down that a tenant may not deny his landlord's title, but the point at issue is whether the parties are landlord and tenant. Under the mortgage deed of 1890 plaintiff clearly did not become mortgagee with possession or "landlord," I am told that the '*kabuliyat*' constituted him mortgagee with possession and landlord. But an unregistered agreement on an eight-anna stamp is insufficient to convert the holder of a mortgage without possession into a mortgagee with possession. It seems to me that the '*kabuliyat*' should be read as not affecting the land in any way, but simply as an agreement to pay Rs. 72 a year, viz., Rs. 50 in Jeth and Rs. 22 in Katak as interest on the loan of Rs. 400 instead of the interest, formerly

agreed upon, that a suit lies for interest, not for rent, and that the decree which has been passed by the lower appellate Court should have been not a decree for Rs. 216 on account of rent, but a decree for Rs. 216 on account of interest for three years.

The record of the case is submitted to the Chief Court with the suggestion that the decree of Lala Moti Ram should be registered as the decree of the District Judge.

* * * * *

JUDGMENT OF THE CHIEF COURT.

JOHNSTONE & SHAH DIN, JJ. (11th December 1906)—After giving our very best consideration to the arguments addressed to us by the pleader for the petitioner, we agree with Mr. Justice Chatterji, who has ordered this reference to be laid before a Division Bench for disposal; that, upon the findings recorded by the Commissioner, it was not competent to him to make a reference to this Court under section 100 of the Punjab Tenancy Act (XVI of 1887). The suit as laid was clearly one cognizable by a Revenue Court, and the Commissioner does not hold that upon the allegations contained in the plaint the Assistant Collector had no jurisdiction to try the suit. If, as the Commissioner appears to us to hold, the relation of landlord and tenant did not exist between the parties under the mortgage deed of 1890, and if, as is found by him, the *Kabuliyat* of 1899 did not create any such relation, the only correct order that could have been passed in the case was one dismissing the plaintiff's suit on the merits, leaving the plaintiff, if so advised, to sue in a Civil Court for recovery of Rs. 216 due (as the Commissioner thinks) on account of interest for 3 years, and not on account of rent. According to the view that apparently commended itself to the Commissioner, the plaintiff ought to have instituted a suit in a Civil Court upon allegations different from those with which he came into the Revenue Court; but from this it by no means follows that if the plaintiff came into Revenue Court with a suit properly framed as a Revenue suit, the Revenue Court had no jurisdiction to try it. It is now well established by authority that as a general rule the jurisdiction of a Court in which a suit is instituted is to be determined by reference to the allegation contained in the plaint supplemented, in some instances, by statements made by the plaintiff in the course of the pleadings—(See *Mewa Singh v. Nathu* 22 P. R. 1894; *Sohna v. Mosam* 23 P. R. 1895; *Ram Singh v. Jowala Singh* 55 P. R. 1896 and *Mula v. Gandu* 92 P. R. 1902, S. C., 16 P. L. R., 1903; at pages 398—399. The allegations made in the plaint in the suit out of which the present reference has arisen are specific and explicit, and upon those allegations

we think it is clear that the Assistant Collector had jurisdiction to hear and determine the suit.

For the above reasons, we cannot, we think, entertain this reference as one properly falling within the scope of Section 100 of the Punjab Tenancy Act, and we consequently return the record to the Commissioner who will dispose of the case with reference to the foregoing remarks.

Reference rejected.

APPELLATE SIDE.

No. 203.

CIVIL.

Before Mr. Justice Robertson and Mr. Justice Shah Din K. B.

SOBHA SINGH,—(PLAINTIFF),—APPELLANT,

versus ^e

KISHORE CHAND AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 27 OF 1907.

Custom—Alienation by male proprietor—Necessity—Speculative litigation—Punjab Courts Act (XVIII of 1884), Section 70, (1), (b) (iii)—Revision—Civil cases—Chief Court not competent to revise points in regard to which application for revision has not been admitted as appeal.

Money raised for speculative litigation cannot be held to be borrowed for legal necessity, and does not justify alienation of ancestral property.

When an application under section 70, (1), (b), of the Punjab Courts Act is admitted in regard to a particular question of law, the Chief Court cannot treat other questions involved in the case open for revision and revise the same.

Further appeal from the decree of Qazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 14th July, 1906.

Lala Chuni Lal, Pleader, for Appellant.

Mr. Ganpat Rai, Advocate, for Respondents.

ROBERTSON AND SHAH DIN, JJ.—(5th March, 1907)—The suit out of which this appeal has arisen was brought by the plaintiff-appellant to contest a mortgage of 530 *kana*ls and 15 *marlas* of land effected by his father in favour of the defendants on 5th October, 1896, for Rs. 1,000. The consideration for the mortgage consisted of two items of Rs. 430 and Rs. 570, the legal necessity in respect of which, as explained in the deed, was stated to be as follows: (1) Rs. 430 were to be paid into Court in a pre-emption suit in which an *ex parte* decree had been obtained by the

mortgagor on 8th August, 1896; and (2) Rs. 570 were required for purposes of another pre-emption case which was then pending. It appears that the sum of Rs. 430 was actually paid into Court by the mortgagor soon after the mortgage, though it was taken back by him on the *ex parte* decree being set aside. In the other case the suit was dismissed and therefore Rs. 570 were never paid into Court at all. In the present suit the plaintiff alleged that the land was ancestral, and that as the mortgage was not made for consideration and legal necessity, it was void against him and did not affect his rights of succession to the land. The defendants pleaded that the land was self-acquired of the plaintiff's father, that the mortgage was for consideration and necessity, that the plaintiff had acquiesced in the alienation, and that the suit was barred by limitation. The first Court found that the plaintiff had failed to prove that the land in suit was the ancestral property of his father; that the alienation was made for necessity and that the plaintiff had acquiesced in the mortgage. It therefore dismissed the plaintiff's suit.

On appeal the learned Divisional Judge, without properly going into the questions of the nature of the property and the plaintiff's alleged acquiescence in the alienation, held that the mortgage was for necessity and on this ground upheld the decree of the first Court.

The plaintiff applied to this Court for revision under Section 70 (1) (b) of the Punjab Courts Act and his revision was admitted by Mr. Justice Chatterji as an appeal in respect of the question whether the necessity for the mortgage as regards the sum of money (Rs. 570) alleged to have been required for the pre-emption suit that was dismissed by the first Court, was or was not established. The plaintiff's application for revision having been admitted in respect of this question alone, we cannot, under clause (iii) of the proviso to Section 70 (1) (b), treat the question of the necessity as regards the sum of Rs. 430 which has been decided by the lower appellate Court in defendants' favour as an open one, and the arguments on both sides were, therefore, limited to the alleged necessity for Rs. 570.

Now as regards this item the learned Divisional Judge has contented himself with remarking that "the defendants had more than sufficient reasons to believe that the money was required for the purpose of "acquiring land by pre-emption," and has held upon the authority of the decision of this Court in *Uttam Singh v. Buta Singh* (Civil Appeal No. 29 of 1902) 67 P. L. R., 1903 that the alienation of ancestral land for such a

purpose must "be held to have been for valid necessity." The authority cited, however, is not in point and does not support the broad proposition which the Divisional Judge has laid down in this case. The question of necessity for an alienation has to be determined in each case with reference to its particular facts; and all that was held in the decision above referred to was that the evidence on the record was sufficient to satisfy the Court "that the sale in suit was effected for the purpose of increasing the estate of the family of the appellants in Bara Pind and was an act of good management within the power of the vendors, and was not assailable by the sons of one vendor." In the present case there is not the remotest suggestion, nor is there any evidence on the record to substantiate any such allegation, if one were made, that the suit for pre-emption was instituted with the sole object of increasing the estate of the family and that the mortgage for Rs. 570 was, all things considered, an act of good management. No doubt there may be cases in which circumstances may justify the temporary alienation of ancestral land by a pre-emptor for the purpose of raising the necessary funds to pay into Court the purchase money; but in all such cases the contemplated benefit to the pre-emptor's estate, such as would support a finding as to the alienation being an act of good management, must be clearly and unequivocally established. The institution of a speculative suit for pre-emption, which, as here, may be unsuccessful and which may have been undertaken simply to satisfy a mischievous craving for litigation can, under no circumstances, be a sufficient justification for alienating ancestral land, and the alienees who advance money to pre-emptors to provide them with sinews of war to fight cases of this description cannot reasonably ask the Courts to regard the alienations made in their favour as for legal necessity.

We think, therefore, that the learned Divisional Judge was not justified in holding that as regards the item of Rs. 570 the mortgage in dispute was effected for valid necessity. This being our view, if the decision of the appeal had turned solely upon the question of necessity for the mortgage, we should have held that the plaintiff was bound by the mortgage to the extent of Rs. 430 only. It is urged, however, for the respondents that the Divisional Judge has not disposed of the other points that arise in the case and which go to the root of the plaintiff's claim, viz., that the property in suit was self-acquired of the mortgagee and that the plaintiff acquiesced in the alienation in question. On both these points the first Court had found in favour of the defendants, and

a finding on either of these adverse to the plaintiff by the lower appellate Court would have sufficed to dismiss his claim. As the respondents are clearly entitled to a decision on each of these questions, and as the lower appellate Court has not disposed of them in its judgments (the finding as to the 165 *kanals* of land being ancestral property does not appear to have been come to after a full consideration of the matter) we set aside the judgment and decree of the lower appellate Court and remand the case for decision with reference to the foregoing remarks.

Appeal allowed.

REVISION SIDE.

No. 204.

CIVIL.

Before Mr. Justice Rattigan.

PURAN,—(PLAINTIFF),—PETITIONER,

versus

TONI AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 2740 OF 1907.

Will—Revocation of—Registered will not found after death of testator—Evidence—Secondary evidence—Burden of proof.

The plaintiff, a minor, claiming under a registered will of his grandfather, sued to set aside an alienation by his father of property included in the will. The original will was not forthcoming. A question arose whether a certified copy of the will was admissible in evidence.

Held, that as under the circumstances from the mere fact that the will was not forthcoming it could not be presumed that the will was revoked by the testator, certified copy of the will was admissible in evidence.

Petition under section 70 (1) (a) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of Captain B. O. Roe, Divisional Judge, Jullundur Division, dated the 26th August 1907, reversing that of Pandit Sri Krishan, Munsif, 2nd class, Nawashahr, District Jullundur, dated the 6th March 1907, decreeing the claim.

Pandit Sheo Narain, Pleader for Petitioner.

Mr. Bodhraj Sawhny, Advocate, for Respondents.

JUDGMENT.

RATTIGAN J.—(19th November 1908).—It is an admitted fact that on the 11th May 1897, one Nihala executed a will disinheriting his son, Devi Das, and leaving his property to his minor, grandson, Puran, the present plaintiff. This will was duly registered.

Nihala died in 1902, and on his death his son, Devi Das, applied for and obtained mutation of names in the Revenue records and thereafter continued to act as the lawful owner of the land now in suit. He first of all mortgaged the land to the defendant, Toni, and subsequently, on the 7th November 1906, sold it to the latter.

Plaintiff is the minor son of Devi Das, and in the present suit, which was instituted on his behalf by his grandmother on the 5th January 1907, he claims possession of the land on the ground that it was devised to him by his grandfather and that his father, Devi Das, had no right to sell it to the defendant-vendee. He also alleges that the sale was without consideration and fictitious.

Defendant-vendee pleaded (1) that the said will was not lost, but had been cancelled by the testator, and had never been acted upon; and (2) that the sale was for good consideration.

Devi Das, who was impleaded as a co-defendant, admitted plaintiff's claim.

The original will was not forthcoming, and plaintiff claimed to prove its contents by production of a copy which he had obtained from the office of the Registrar, on the ground that the original was lost. Defendant-vendee, as I have stated, did not contest the fact that a will was made by Nihala. He, however, denied that the original was lost and urged that it has been cancelled, and the contention on his behalf was that in the circumstances secondary evidence of its contents was not admissible.

The first Court held that though the evidence did not prove that the original was lost, there was no reason to doubt that it was virtually lost and that consequently the secondary evidence tendered was admissible. It further held that the will must be taken to be subsisting as defendant-vendee had failed to prove that it had been duly cancelled by the testator. A decree was accordingly passed in plaintiff's favor for possession of the land on the ground that Devi Das had no right to mortgage or sell it to defendant-vendee.

From this decree the latter appealed to the Divisional Judge, who held that there was no proof of the loss of the original will; that consequently secondary evidence of its contents was not admissible under section 65 of the Indian Evidence Act; and that as the original will was not forthcoming at the time of the testator's death, it must be presumed that the said will had been cancelled or destroyed by the testator prior to his death.

Against this decision the plaintiff applies to this Court under section 70 (1) (a) of the Punjab Courts Act on the ground that the lower appellate Court has acted with material irregularity in rejecting legally admissible evidence. Mr. Sheo Narain's argument on petitioner's behalf is that the copy of a will which is duly registered under the provisions of the Indian Registration Act, 1877, is a public document within the meaning of section 74 (2) of the Indian Evidence Act, 1872, and as such is admissible in evidence under section 65 (e) of that Act, apart from any question as to whether or not the original will is lost or destroyed. The learned pleader also contended that there was no ground for holding that the original will was not lost, and that there was in law no foundation for the learned Divisional Judge's theory that a will not forthcoming at the date of the testator's death must be presumed to have been cancelled or revoked by him.

Mr. Bodhranj for respondents argued that the present suit was a scandalously collusive one, the plaintiff's father being in reality the plaintiff and trying to cheat the defendant-vendee; that the will must have been cancelled as otherwise plaintiff's father would never have been allowed to obtain possession of the land and defendant vendee, a resident of the village, and as such presumably conversant with the affairs of plaintiff and his father, would not have accepted the latter as the owner of the land; and that as there was no proof of the loss of the will, secondary evidence of its contents was not admissible. I cannot agree with all that Mr. Bodhranj urged with respect to the collusive nature of the suit. The plaintiff, it must be remembered, is an infant, and after Nihala's death, it is hardly a matter of surprise that Devi Das obtained possession of the land. It is also by no means improbable that Devi Das destroyed the will of Nihala after the latter's death. But be this as it may, the infant-plaintiff and his next friend, his grandmother, were obviously in the hands of Devi Das, and the latter's misdeeds cannot well be imputed to plaintiff. No doubt Devi Das is now siding with his infant son, but the latter's rights ought not to be ignored simply because his father is an unprincipled scoundrel. It was possibly on account of Devi Das' bad character that Nihala disinherited him and made his grandson, the present plaintiff, heir to all his property. Furthermore, I cannot lose sight of the facts that the present suit was brought within 3 months of the date of sale, and that the only person to whom plaintiff could look for help and protection was his grandmother who is also Devi Das' mother. I do

not consider, therefore, that the present suit is, on its merits, so undeserving of consideration as the Divisional Judge appears to have thought. Devi Das, of course, wishes the suit to succeed, but this fact should not blind the Court to the minor's rights. I have now to deal with the question of the will. That a will in favour of plaintiff was actually made by Nihala, and that the making of such will was within the competency of the latter, are facts not denied by defendant-vendee. On the contrary these facts are apparently conceded. The defendant-vendee's main argument is that as the original will is not forthcoming, it must be presumed that it was revoked by the testator. I confess I am unable to follow this argument. The testator, when he made the will in question in 1897, was careful enough to see that it was duly registered, and I cannot believe that a man of his methodical habits would have thought that the mere tearing up of his will, of which a copy was extant in the office of the Registrar was sufficient cancellation thereof. A man who registers his will must be taken to be a man of method, and I agree with the *munsif* that such a man, if he subsequently wished to revoke the will which he had registered, would have taken equal pains to have had another will, revoking the prior will, also registered. To a man of such prudence it would have been obvious that the mere tearing up of his will would mean only this that the person in whose favour the will was made could plead that the original was lost and that therefore a certified copy obtained from the Registrar's Office was sufficient proof of its contents. I cannot agree with the learned Divisional Judge that, in a case such as this, where the will was originally registered with all due formality, the mere fact that the original document is not forthcoming after the testator's death necessarily leads to a presumption that the testator destroyed or cancelled that will. In the present case, the presumption would, I think, be that the original will was destroyed by Devi Das after Nihala's death. He had been disinherited, but when the succession opened out, he was the only adult male member of the family and the real heir was his own infant son. It is hardly assuming too much to infer that he took possession of everything after his father's death and that he promptly got rid of an inconvenient document such as the will in question. I have every sympathy with the defendant-vendee, who has been made the victim of a gross fraud, as Devi Das undoubtedly posed as the owner of the property, and as such induced the defendant-vendee to advance money in consideration of the sale of

the land. But however much I may sympathise with the victim of this disgraceful fraud, I must not lose sight of the rights of the minor, who had himself no hand in that swindle, and who is equally entitled to the sympathy of the Court. I cannot under the circumstances draw the presumption that the will was cancelled or destroyed by the testator, and I must hold that the Divisional Judge erred in assuming that there was any such presumption. The fact then remains that a will was admittedly made, but is not forthcoming. The copy is, of course, a correct copy of that will, and there is no conceivable reason why plaintiff should prefer to produce that copy, if he can produce the original. The *munsif* very rightly discredited the evidence of certain witnesses who testify to the effect that the testator destroyed the will, and the Divisional Judge does, and very rightly, not rely upon that evidence. He does not even allude to it. It seems to me that the irresistible inference under these circumstances is that Devi Das has destroyed the will, and there can be no doubt that he had both opportunity and motive for doing so. But if he did so, and I have no doubt he did, the plaintiff cannot be made accountable therefor. I hold accordingly that the evidence adduced by plaintiff in support of the allegation that there was a will in his favour was rightly admitted by the first Court and erroneously ruled out by the Divisional Judge, and I further hold that the said will has been duly proved. Upon the finding it is clear that Devi Das had no power to either mortgage or sell the land, and whatever remedy defendant-vendee may have against Devi Das, plaintiff's present suit must succeed, for he was no party to either the mortgage or sale effected by Devi Das.

I accordingly accept this petition, and, reversing the order of the lower appellate Court, I restore the decree of the first Court with costs throughout against the respondent, Devi Das, who is responsible for this litigation.

Appeal accepted.

APPELLATE SIDE.

NO. 205.

CIVIL.

Before Mr. Justice Rattigan.

BHAGWAN KAUR,—(PLAINTIFF),—APPELLANT,

versus

GAJINDAR SINGH,—(DEFENDANT),—RESPONDENT.

CASE No. 682 OF 1908.

Civil Procedure Code, (Act XIV of 1882), Sections 223, 243—Execution of decree—Stay of execution—Power of Court to which decree is transferred for execution.

Held, that the Court to which a decree is transferred for execution is competent to stay execution of the decree on an application made under section 243 of the Civil Procedure Code.

Held, also, that an order refusing application to stay execution is no bar to the grant of a subsequent application made for the same purpose, if by change of circumstances interests of justice require that stay should be ordered, 8 W.R. 392, not followed. 6 N.W.P., H.C.R. 181, I.L.R. VII, All. 73, X All. 389 followed.

Miscellaneous first appeal from the order of A. Latif, Esquire, District Judge, Amritsar, dated 23rd May 1908.

Messrs. Grey and Roshan Lal, Advocates for Appellant.

Lala Lal Chand, R. B., Advocate for Respondent.

JUDGMENT.

RATTIGAN, J.—(20th July 1908).—The decree in this case was passed by a Court in the Lahore District and was transferred for execution to the Court of the District Judge, Amritsar. The judgment-debtor, Rani Bhagwan Kaur, has instituted a suit in the latter Court against the holder of the decree, and has applied under Section 243 of the Civil Procedure Code for stay of execution of the said decree. This application has been refused by the District Judge on the ground that a previous application for stay of execution was rejected both by the District Court and by this Court. From this order an appeal has been preferred to this Court, and for the appellant Mr. Grey points out that the former application was rejected at a time when no suit was pending between the parties, and that the circumstances are altogether different now that the judgment-debtor has actually instituted a suit in which the proper meaning of the decree is the main point of issue.

For respondent, Mr. Lal Chand argues that under Section 243 the Court to which a decree has been transmitted for execution has no jurisdiction to take action under that section, as the words "such Court" mean the Court which passed the decree and that Court only. He relies on the case of *Mittun Bibee v. Busloor Khan*, VIII, S. W. R., 392, and also upon the words of the section itself. There is, no

doubt, considerable force in his argument, but the weight of authority is in favour of the contention that a Court to which the decree is transmitted for execution has power to act under Section 243 (see *Cooke v. Hosechi Bebee*, 6 N. W. P., 181, *Ghazidin v. Fakir Bakhsh I. L. R.*, VII All., 73, and *Kassa Mal v. Gopi I. L. R.*, X. All., 389. I am not prepared to go against these latter authorities, and I therefore hold that the District Judge of Amritsar had jurisdiction to stay proceedings under that section.

The next question is whether proceedings should have been stayed in this case. In my opinion they should have been. I do not wish to say one word that might in any way prejudice the case for either party in the suit which is pending between them, but I think I may go so far as to remark that up to date the point at issue has not been definitely decided. In the former case it must be remembered that the present appellant and the present defendant were arrayed on the same side as defendants and that the decree was passed in accordance with a compromise. The right meaning of this decree and its proper scope are now apparently the bone of contention between appellant and respondent, and until this question is definitely settled, I do not think it would be right to eject appellant from the house in which she claims (rightly or wrongly) to have a right of residence, and where she has in fact been residing ever since *Sardar Dyal Singh's* death, some 13 years ago. The District Judge's reason for rejecting appellant's application has nothing to do with its merits, and he obviously overlooked the change that had occurred in the relationship of the parties by the institution of the suit which is now pending in his Court.

I therefore accept this appeal and direct that the execution of the decree in the former suit be stayed until the pending suit has been decided. Respondent will pay the costs of these proceedings.

Appeal allowed.

APPELLATE SIDE.

No. 208.

CIVIL.

Before Mr. Justice Kensington and Mr. Justice Johnstone.

SABHAI,—(PLAINTIFF),—APPELLANT,

versus

ALI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 12 OF 1908.

Custom—Muhammadan Law—Succession—Daughter—Laghari Bilochis of Sanghar tahsil, Dera Ghazi Khan District.

Held, that the plaintiffs, on whom the burden of proof lay, having failed to prove custom excluding daughters from inheriting property left by their father among *Laghari Bilochis* of Sanghar tahsil, Dera Ghazi Khan District, to which tribe the parties belonged, the Muhammadan Law governed succession under which daughters are entitled to share inheritance.

Further appeal from the decree of Lala Mul Raj, R. B., Additional Divisional Judge, Multan Division, dated 28th March 1906.

Mr. Roshan Lal, Advocate for Appellant.

Mr. Vishnu Singh, Advocate for Respondents.

JUDGMENT.

KENSINGTON, J.—(6th March 1908).—The parties are *Laghari Bilochis* of the Sanghar tahsil of the Dera Ghazi Khan District. The question is as to the succession to Sarwar. The plaintiff-appellant is *Mussamat Sabhai*, one of his three daughters, claiming her share of the estate by Muhammadan law. The really contesting defendants are his male collaterals, descendants of a common grandfather Musallim, in whose favour mutation was effected some time after Sarwar's death. Other defendants are the two remaining daughters of Sarwar and his three sisters, some of whom are said to be married within the family and therefore not immediately interested in *Mussamat Sabhai's* claim. However this may be, they do not appear to have taken any active part in the case.

The first Court gave plaintiff a decree for her legal share of $\frac{16}{72}$, and the correctness of the share calculation is not disputed. The lower appellate Court has found after a remand enquiry that the parties are governed by custom in matters of inheritance and has thereon dismissed the plaintiff's suit, notwithstanding that the return to the remand was distinctly in her favour.

The main question which we have to determine is whether Muhammadan law applies to the family or custom. The learned Divisional Judge has given a somewhat curt decision in favour of custom, and has, we think, overlooked the strength of the feeling in the Sanghar tahsil tribes in favour of Muhammadan Law so far as the daughter's right of succession is concerned. We do not suppose that Muhammadan law is followed strictly in all cases of succession, but there is a good deal to

show that the custom of these *Bilochis* is largely tinged by preference for Muhammadan law rules where the contest is between daughters and collaterals.

We start with the proposition, not now open to question, that unless a customary rule of succession is established Muhammadan Law must be applied, [Section 5 Punjab Laws Act and *Daya Ram v. Sohail Singh*, 110 P.R., 1906, F.B., S.C., 31 P.L.R., 1907, F.B]. We find it stated under question 40 in the Dera Ghazi Khan Code of Customary Law that a few sections of the *Natkani* tribe of the Sanghar *tahsil* follow Muhammadan Law pure and simple, while the remaining *Bilochis* of this *tahsil* deny the daughter's right of succession subject to the father's right to bequeath to her up to the extent of her legal share.

We have next clear decisions by this Court more or less in support of Muhammadan Law in Civil Appeal No. 994 of 1889, decided on the 24th July 1890 (*Mussamat Gauhar v. Khan Muhammad and Manu*) and in Civil Appeal No. 199 of 1895 (*Khan Muhammad v. Mussamat Jano and others of mauza Jhok Kaziwali*, decided on 12th November 1897). In the latter of these cases a detailed remand enquiry was ordered by this Court throughout the Sanghar *tahsil*, the general result of which was to show that in matters of female succession, at any rate, custom was largely modified by Muhammadan Law by the *Bilochis* generally and not merely those of the *Natkani* tribe.

In addition, in the present case, certain instances have been quoted, and there is report by a local commissioner which all go to show that there is no definite custom excluding females from their share by inheritance. The conclusion from the enquiry now made is the same as that arrived at in the 1895 case. The practice is not uniform, but there is a good deal to show that the rights of daughters (at any rate in the absence of sons) are recognised to some extent whenever there is a dispute. We do not believe that the intricate rules of Muhammadan Law are followed universally or even closely in the matter of succession to land, but there is a distinct tendency to fall back on the guidance of Muhammadan Law in case of dispute.

We have some hesitation as to the proper way of dealing with so doubtful a matter, but, as we are unable to find that there is any clearly defined custom to guide the Courts, we are unable to support the decision of the lower appellate Court, which seems to have been given on general grounds rather than on the available evidence. The alternate basis for decision must be law rather than custom, and as the plaintiff

presses her claim we think that it should succeed. The ruling in favour of custom in *Bakht Sawai v. Sardar Khan*, 119 P. R. 1907, was not for the Sanghar *tahsil* and was based on particular instances held to cover that particular case. We cannot treat it as a precedent covering the case now before us.

One minor point in the case has to be noticed. It is urged for the defendants that they should be given credit for sums paid on account of Sarwar's debts. There has been no enquiry on this point and we do not know whether there were any such debts, and, if so, by whom they were paid. But nothing is alleged which would justify treatment of the payments, if there have been any, by defendants, as constituting a charge on the land. It may be hoped that the parties will be able to settle this comparatively trifling matter without the intervention of the Courts, and we cannot deal with it now or direct any further enquiry on the point.

The appeal is accordingly accepted and the decree of the first Court in plaintiff's favour is restored. We direct that the parties pay their own costs in all Courts.

Appeal allowed.

FULL BENCH.

REVISION SIDE.

No. 207.

CIVIL.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Chatterji,
C. I. E., and Mr. Justice Rattigan.*

KASU AND OTHERS,—(JUDGMENT-DEBTORS),—PETITIONERS,

versus

ATAR SINGH,—(DECREE-HOLDER),—RESPONDENT.

CASE No. 2656 OF 1907.

Rulings of Chief Court—Duty to follow—Limitation Act (XV of 1877), Schedule II, Article 179—Execution of decree—Limitation—Step in aid of execution—Application to withdraw money deposited by judgment-debtor.

A Subordinate Court is bound to follow the rulings of the Chief Court, quite irrespective of any conflict of authority that there may be between those rulings and the decisions of the High Courts and of any views which the Court may entertain as to the equities of the case which it is dealing.

Held, by the Full Bench, that an application by the decree-holder to the executing Court for payment to him of money deposited in Court in partial satisfaction of the decree is not an application to take some step in aid of execution within the meaning of article 179 (4) of the Limitation Act, 107 P.R. 1881, 88 P.R., 1884, 27 P.R., 1888, 18 P.R., 1904, 76 P.R., 1904, S. C., 132 P.L.R., 1904; I.L.R. VIII Cal. 890, X Cal. 549, XI Cal. 227, XXII Cal. 196, X W. N. Calc. 28 followed. I. L. R. XI Mad. 174, XVI Mad. 452, XVII Mad. 165. XXII Bom 310, VI All. 366, XII All. 399 dissented from.

Petition for revision of the order of Lala Ram Nath, District Judge, Ludhiana, dated 16th November 1907.

Mr. Vishnu Singh, Advocate for Petitioner.

Mr. Cooper, Advocate for Respondent.

ORDER OF REFERENCE.

REID J.—(14th March 1908).—The lower appellate Court was bound to follow *Mul Chand v. Kour Singh*, 27 P. R., 1888, which has not, as admitted by counsel for the respondents, yet been set aside. It was referred to and distinguished in *Lal Devi v. Karim Bakhsh*, 18 P. R., 1904, and referred to and not dissented from in *Bahadur Khan v. Sadho Singh*, 76 P. R., 1901, by Single Benches. At the same time it is directly opposed to *Puran Singh v. Jawahir Singh*, I. L. R., VI All., 366, and *Bapu Chand Jethi Ram Gujar v. Mugut Rao*, I. L. R., XXII Bom. 340.

The Allahabad case was not cited in *Mul Chand v. Kour Singh*, 27 P. R., 1888, and the point was considered at considerable length in the Bombay judgment.

The conflict of authority and the question raised justify, in my opinion, reference to a Full Bench, and, after consultation with the learned Chief Judge, I refer this application to a Full Bench accordingly.

FULL BENCH JUDGMENT.

CLARK, C. J., CHATTERJI AND RATTIGAN, JJ.—(19th June 1908).—

The question involved in this reference to a Full Bench is, whether an application by a decree-holder to the executing Court for payment to him of a certain sum of money deposited in Court in partial satisfaction of the decree, is an application to take some step in aid of execution within the meaning of Article 179 (4) of Act XV of 1877.

The facts of the case before us are very simple. The decree was passed on the 13th June 1900. On the 25th June 1904, the decree-holder, whose right to execute the decree was admittedly not barred on that date, applied to the Court for delivery to him of a certain cheque which had been paid into Court in partial satisfaction of the decree on the 24th of that month. On the 29th June 1904 the decree-holder gave a receipt for the amount of the said cheque. On the 24th June 1907, the decree-holder applied to the Court for execution of the balance of his decree. This last application is within time, if it can be held that the application made by the decree-holder on the 24th June 1904 is either an application to execute the decree or to take some step in aid of execution within the meaning of Article 179 of the Limitation Act. That it was not an application to execute the decree is obvious, and the sole question is whether it can be regarded as an application to take some step in aid of execution. Upon this question there is a conflict of authority

According to the rulings of this Court and of the High Court of Calcutta, it cannot be so regarded. Cf. *Nawab Saadat Ali Khan v. Nawab Muhammad Ali Khan*, 107 P. R. 1881, *Moulvi Muhammad Shaffee v. Budri Mal*, 88 P. R., 1884, *Mul Chand v. Kour Singh*, 27 P. R., 1888, *Lal Devi v. Karim Bakhsh*, 18 P. R., 1904, *Bahadur Khan v. Sadho Singh*, 76 P. R., 1904, S. C., 132 P. L. R., 1904. *Hem Chunder Chowdhry v. Brojo Soondury Debee*, I. L. R., VIII Cal., 89, *Fazl Imam v. Metta Singh*, I. L. R., X. Cal., 549, *Ganga Pershad Bhoomick v. Debi Sundari Dabea*, I. L. R. XI Cal., 227, *Ananda Mohan Roy v. Hara Sundri*, I. L. R. XXIII Cal., 196, *Sadanada Sarma, v. Kali Sankar, Rajpai*, 10 C. W. N. 28.

On the other hand, the High Courts of Madras, Bombay and Allahabad hold that an application of this kind does amount to an application to take some step in aid of execution.

Cf. *Venkatarayalu v. Narashaim*, I. L. R. II Mad. 174, *Kerala Varma v. Shangaraim*, I. L. R., XVI Mad., 452, *Koormayya v. Kishnamama Naidu*, I. L. R., XVII Mad. 165, *Bapuchand v. Mugut Rao*, I. L. R. XXII Bom., 340, *Puran Singh v. Jawahir Singh*, I. L. R. VI All., 366, and *Sujan Singh v. Hira Singh*, I. L. R., XII All. 399.

Clearly then the question is one of some difficulty, but after giving it our most careful consideration, we are satisfied that the views of this Court and of the High Court of Calcutta are correct. We are far from

saying that an application by the decree-holder to withdraw money paid into Court may not under special and exceptional circumstances amount to an application to take some step in aid of execution. It is quite possible that under certain circumstances, *e.g.*, when there is some dispute between the judgment-debtor and the decree-holder as to the latter's right to withdraw the money and the Court has to decide judicially in such dispute, an application of the kind may fall within the purview of article 179. But, exceptional cases apart, an application *simpliciter* by the decree-holder to withdraw money which the executing Court holds in deposit for him cannot, in our opinion, be treated as an application of that kind. To the extent of the money so deposited the decree has been satisfied and duly executed, and the payment of such money by the Court to the decree-holder is a mere ministerial function. It cannot refuse to pay the money to the decree-holder, and it is not denied that the latter can at any time apply to the Court for payment thereof. He can, for example, apply for payment 10 years after the deposit. This being so, it would certainly be anomalous that a decree-holder should, by deferring to make an application for payment of such money until after the lapse of so many years, be able to revive his right to execute the decree as regards so much of it as remained unsatisfied. Ordinarily, in order to keep his decree alive, he must make the necessary application within three years of each other, but as he can apply for payment of the money at any time, he would, in respect of this particular form of application, be given the right, subject of course to the provisions of Section 230 of the Civil Procedure Code, to defer execution of the decree until such time as he pleases. We cannot believe that such an anomaly could have been intended. Quite apart, however, from this objection, we agree with the reasoning of the learned Chief Judge in *Ananda Mohun Roy v. Hara Sundri*, I. L. R., XXIII Cal., 196, and we find no reasons whatever given in the judgments of the other High Courts which have taken a different view. In *Sujan Singh v. Hira Singh*, I. L. R., XII All., 399 Mahmnd, J., does indeed say that "an action taken by the decree-holder for the purposes of acquiring the fruit of the execution of the decree or rather partial fruit of the execution of decree is a step in aid of the execution of the decree" (page 406). With every respect to the views of so learned a Judge, we are unable to see how it can be argued that a person who takes steps to acquire *the fruits of the execution of the decree*, really takes steps *in aid of the execution of the*

decree. The "fruits of the execution of decree," postulate surely that the decree has been executed, and the partial fruits of the execution of the decree equally postulate that *pro tanto* the decree has been executed. To take steps, therefore, to acquire those fruits cannot logically be regarded as a step towards executing the decree, for *ex hypothesi* the decree must have been executed (in whole or in part as the case may be) before those fruits, whether in whole or in part, can be acquired, whereas the expression "*step in aid of the execution*" must clearly mean that the decree has not been executed when that step is taken. In the case before us we must accordingly hold, upon our view of the law, that the application for execution made by the decree-holder on the 24th June 1907, was barred by limitation. We, therefore, accept this application for revision, and, setting aside the order of the District Judge, we restore that of the *Munsif*, which rejected the decree-holder's said application for execution.

Respondents must pay costs throughout.

Before concluding we would impress on the District Judge the fact that he is bound in all cases to follow the rulings of this Court, quite irrespectively of any conflict of authority that there may be between those rulings and the decisions of other High Courts and of any views which he may himself entertain as to the equities of the case with which he is dealing. In the present case the District Judge deliberately refused to follow the decisions of this Court and based his order upon certain rulings of the High Courts of Madras, Bombay and Allahabad, which were admittedly at variance with the reported decision of this Court. In so acting he was guilty of grave disrespect to the Court to which he is subordinate.

Application allowed.

REVISION SIDE.

No. 208.

CIVIL.

AYA RAM AND OTHERS,—(DEFENDANTS),—PETITIONERS,

versus

KARM NARAIN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 1249 OF 1908.

Revision—Civil Cases.—Quantum of evidence—Question of fact.

The Chief Court will generally refuse to exercise its powers of revision in civil cases on questions of fact when there is evidence on record which the lower Court has considered. It cannot be said that the lower appellate Court has committed a material irregularity merely because it may possibly have come to a wrong conclusion in weighing the evidence—*P. R. 9 of 1894 followed.*

Petition under section 70 (1) (a) of Act XXV of 1899, Punjab Courts Act, from the order of the District Judge, Jhang, dated the 29th February 1908.

Mr. Sheo Narain, Pleader for Appellant.

Mr. Lal Chand, Advocate for Respondent.

JUDGMENT.

KENSINGTON J.—(16th November 1908).—This is a petition for revision by the defendants on the ground that the lower appellate Court's decree in favour of plaintiffs is not based on anything in the record which can be properly treated as evidence. After examining the record I consider that the defendant's allegation goes much too far. There certainly is evidence in support of plaintiffs' claim. It may not be very good evidence, but, such as it is, the District Judge has accepted it as sufficient. In a dispute of the kind it is hardly to be expected that either side will be able to produce conclusive evidence, and the Courts must do their best with such material as may be available.

It cannot be said that the lower appellate Court has committed a material irregularity merely because it may possibly have come to a wrong conclusion in weighing the evidence. Following *P. R. No. 9 of 1894*, I must hold that no revision lies. The petition is dismissed with costs.

Petition dismissed.

APPELLATE SIDE.

No. 209.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Johnstone.

PIR BAKHSH,—(PLAINTIFF),—APPELLANT,

versus

SARDAR BANO,—(DEFENDANT),—RESPONDENT.

Custom—Succession—Widow—Collaterals—Right of widow of low caste against collaterals—Sahswal Rajputs of Fatehjang tahsil of Attock district—Punjab Land Revenue Act (XVII of 1887) section 44—Presumption—Custom—Chakwar statement of custom.

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that among Sahswal Rajputs of Fatehjang tahsil of Attock district, a widow of inferior caste was not entitled to a life estate but only to maintenance in the presence of collaterals of her deceased husband.

Held, also that as the *chakwar* statement of custom prepared at the time of settlement of the Rawalpindi district, did not form part of the Settlement Record it was not entitled to a presumption of correctness under section 44 of the Punjab Land Revenue Act, 44 P. R. 1907 referred to.

First appeal from the decree of Sheikh Rukn-ud-din, District Judge, Attock, dated 14th November 1906.

Mr. Muhammad Shafi, Advocate for Appellant.

Messrs. Grey and Gobind Das, Advocates for Respondent.

JUDGMENT.

CHATTERJI AND JOHNSTONE, JJ.—(12th November 1907).—In this case plaintiff is a Sahswal Rajput of the Fatehjang tahsil of the Attock District (formerly Rawalpindi). Defendant is the widow of one Mehr Khan, Sahswal, paternal uncle of plaintiff. Mehr Khan married first a Sahswal woman and then the defendant who belongs to the tribe of Maliars. The first wife, long since dead, left three daughters, all married. Defendant has no children, and the question at issue really is whether she takes the usual life-estate in her deceased husband's property, or whether, as a woman of a different and inferior tribe, she is entitled only to maintenance.

The Court below has found, following the report of a local commissioner, that the Maliars are low caste people. Mr. Grey, representing the lady, has argued against this. The Court then went on to hold that,

even though she is low-caste, no custom is established whereby she is debarred from enjoying the usual widows's estate, and so it dismissed the suit.

The nephew appeals, and we have heard the case argued by Mr. Muhammad Shafi on his behalf. He relies upon the *Wajib-ul-arz* or *Riwaj-i-am*, the views of Mr. Robertson given in the volume of Customary law of the Rawalpindi District, and the instances in the record of the lower Court.

The relevant section of the *Wajib-ul-arz* is printed at page 2 of the paper-book. It deals with co-wives and their relative rights, and so is only indirectly in point. It lays down that, where there is one wife of equal rank with her husband and another a *kamin*, the descendants of the *kamin* wife shall get a share only by way of maintenance, not equal to the share of the other branch. On this it is not easy to justify the dictum that, when there is only a Maliar widow of a Rajput proprietor, she can get only cash or grain allowance, the land going to the agnatic heir. In the first place, the section deals only with *descendants* of widows. Next, because the *kamin* widow is not to share equally with the widow of Rajput caste, it hardly follows as a matter of course that even as against reversioners the *kamin* widow cannot get a life-estate. It should be noted that the section does not give the *kamin* widow's family a mere cash or grain allowance but a share less than that of the co-widow's family. No doubt it is said that this smaller share is "by way of maintenance," but then this is, in the last analysis, the meaning of the Punjabi widow's life-estate everywhere. Thirdly, it is doubtful whether the Maliars can properly be called *kamins*. If the word is used simply in contradistinction to *sahu* or noble, then no doubt the Maliar is not *sahu* and so is *kamin*, but if *kamin* is used to mean the village menial, as elsewhere in the province, the Maliar is certainly not a *kamin*. The evidence shows that he renders certain services to the Rajput landlord, when he is, as he usually is in these parts, a tenant; but at the same time he is differentiated from the real *kamin* by the circumstance that the real *kamin* serves Maliar as well as the Rajput and receives dues from them both.

Even then if this *Wajib-ul-arz* was part of the Settlement record and so was entitled to a presumption of correctness under Section 44, Punjab Land Revenue Act, I would hesitate to condemn a Maliar

widow of a Rajput to a grain or cash allowance in the presence of an agnate on the strength of that document alone. But it is clear, *Guldad Khan v. Gul Khan*, 44 P.R., 1907, S.C., 82 P.L.R., 1908, that the document is a *chakwar* statement of custom and so does not form part of that record. No doubt, as Mr. Shafi points out, this section 12 is more valuable as an indication of custom than the section dealt with in the ruling quoted, which was concerned with pre-emption; but this is all that can be said for it at the best, and taking all these matters into consideration, I would hold that section 12 affords virtually no support to plaintiff's case.

Next Mr. Shafi refers us to the *Riwaj-i-am*, pages 4 and 5, paper book. Here again the question is between co-wives of different ranks, and it is recorded that among Rajputs and Janjuas, who, Mr. Shafi says, are the same as Sahswal, a *kamin* widow gets only maintenance in presence of the *sahu* widow. One Rajput instance is given in which the low caste widow was a Kashmiran.

Mr. Robertson, in discussing this same question at page 14 of his book, says that the custom (of giving only maintenance to the lower caste widow) is well established among many tribes, including Rajputs; but in support we have only the one instance aforesaid of a Kashmiri widow.

It is clear then, that there is no legal presumption in favour of the nephew in this case and that the records of custom examined do not prove his point. It remains to see whether a custom in his favour is proved by actual instances. Many instances are mentioned, more or less vaguely by various witnesses, but Mr. Shafi admits that he can make nothing of any of them except the following:—

- (1). *Mussammat Mughlani's* case.
- (2). *Mussammat Bhagbhari's*.
- (3). *Mussammat Matto's*.
- (4). *Mussammat Thano's*.
- (5). *Mussammat Malik Bano's*.
- (6). *Mussammat Bibi Gulabi's*.

(1). This is a case of a Ghakhar husband. A witness says that *Mussammat* Mughlani, being a Mallari by tribe, only got 10 or 11 *ghumaos* out of 200, the rest going to her husband's nephews, page 47, paper book, but the mutation entry, which shows the case an old one, tells a different tale, the whole area being 42 acres odd, *Mussammat* Mughlani getting only one-third of it.

(2). Mir Khan, witness for plaintiff, says this lady was a Sahswal herself and married to a Sahswal, and this is not contradicted anywhere, so far as I can see. The instance is thus useless.

(3). Before the local commissioner, Hassan, witness, says *Mussammat* Matto had sons alive: if so, she naturally only got maintenance as a widow. Muhammad Khan, another witness, says she is supported by a collateral and does not mention sons one way or the other. This instance also has no value.

(4). *Mussammat* Thanu seems to have got the land on her husband's death, and to have surrendered it on the eve of re-marriage, see witness Ahmed Khan before local commissioner and the story is told slightly differently and in greater detail by Fateh Khan, a later witness. The instance is no help to plaintiff.

(5). This instance is apparently mentioned by only one witness, Bahadur Khan, son of Lal Khan. He does not know the tribe of the husband. The quarrel, he says, went up to the Chief Court, the widow getting the worst of it, but no copies of judgments, or even particulars of them, are forthcoming.

(6). Bibi Gulabi's case depends upon defendant's statement alone, and she says the lady has sons alive.

It is clear then that we have really no instance entirely *apropos*, case No. (1) above being a Ghakhar case, and the instance in the *Riwaj-i-am* being a case of contest between co-widows and the rest being quite useless; and I hesitate to hold that defendant is to be excluded on the strength of such evidence. I would therefore dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

CIVIL.

No. 210*Before Mr. Justice Shah Din***JOWNAD SINGH (DEFENDANT),—APPELLANT.***versus***ISHAR SINGH (PLAINTIFF),—RESPONDENT.****CASE No. 295 OF 1908.***Custom—Alienation by sonless male proprietor—Necessity—Duty of vendee.*

It is not enough for the vendee that he pays consideration for an alienation of ancestral land by a sonless proprietor in the presence of the Sub-Registrar. He is bound to enquire that the amount is required by the vendor for a necessary purpose. The mere statement of the vendor that money is required for purchase of other land as an act of good management does not relieve the vendee of his duty to make the necessary enquiry.

Further appeal from the decree of the Additional Divisional Judge, Amritsar Division, dated the 24th February 1908.

Mr. Vishnu Singh, Advocate for Appellant.

Mr. Lachmi Narain, Advocate for Respondent.

JUDGMENT.

SHAH DIN J.—(10th November 1908). This appeal and the connected revision (which could have been filed as an appeal) will be disposed of by one judgment.

After hearing counsel for the appellant-vendee I think that the Additional Divisional Judge rightly disallowed the two items of Rs. 200 each, one alleged to have been paid by the vendee under the terms of the sale-deed to Sant Singh, and the other to the vendee himself in October 1901. The *bahi* of Sant Singh is not forthcoming, and the loss of it has not been proved. The receipt exhibit D II in the *bahi* of the vendee—which purports to relate to this alleged payment to Sant Singh, is wholly inconclusive. The suit for expenses of which the other item of Rs. 200 was borrowed went off by default in August 1901, and thereafter no attempt was made to have it restored to the file.

On these grounds I dismiss this appeal.

As regards the connected revision, it is clear that, according to an uniform current of decisions in this Court, the vendee was bound, before

advancing the item of Rs. 267 to the vendor Harnam Singh, in presence of Sub-Registrar, to satisfy himself by making due enquiry that the amount in question was wanted by the vendor for a necessary purpose, viz., for the purchase of land in the Ambala District, as an act of good management of ancestral property. There is no evidence to show, nor is there a suggestion, that such an enquiry was made by the vendee. He simply relied on the word of the vendor, without taking the least trouble to ascertain the nature and extent of his necessities in this particular; and that being the case, he clearly is not protected by the law applicable (see 104 P. R. 1887).

I therefore disallow the item of Rs. 267. There only remains the mortgage item of Rs. 99, which, for the reasons given by the Divisional Judge, I would allow in full. The major portion of the sale consideration having thus been disallowed, the item of Rs. 8 taken for expenses of the deed must fall to the ground.

The result is that out of Rs. 800 I allow only the item of Rs. 99 as having been borrowed for necessity.

I therefore accept the plaintiff's revision, and decree possession of the land in suit conditional, on payment of Rs. 99 to the defendant-vendee.

Under the circumstances of the case, I think I should direct the parties to bear their own costs.

REVISION SIDE.

No. 211

CRIMINAL

Before Mr. Justice Robertson.

KALA KHAN AND OTHERS, (ACCUSED)—PETITIONERS,

versus

CROWN—RESPONDENT.

CASE NO. 947 OF 1908.

Criminal Procedure Code (Act V of 1898) Section 195,—Penal Code (Act XLV of 1860), Section 182—False report to police—Sanction to prosecute—Procedure.

Before granting a sanction to prosecute, the provisions of the Criminal Procedure Code, *inter alia* section 190 *et seq* including Section 195 must be strictly followed. A vernacular order passed by an executive officer merely bearing some more

or less illieigible initials directing a subordinate Magistrate to take up a case under section 182 I. P. C., is not sufficient compliance with the requirements of law.

The butchers of a town made an application to the Deputy Commissioner of the District that the Hindu shopkeepers of the place would not supply them and asked him to take measures for their relief. The Deputy Commissioner on the report of the *Tahsildar* to the effect that it was not shown that any ring or boycott had been established, without any complaint by any one and without calling the petitioners before him, issued a vernacular order for their prosecution under section 182 I. P. C.

The Chief Court on revision set aside the order as illegal.

Petition under sections 435—439 of the Criminal Procedure Code for revision of the order of L. W. King, Esquire, District Magistrate, Gurdaspur District, dated the 27th April 1908, ordering the prosecution of the petitioners.

Mr. Fazal Hussain, Advocate for Petitioners.

The Government Advocate for Respondent.

JUDGMENT.

ROBERTSON J. (30th October 1908).—The facts in this case are simple. On 23rd March 1908, certain butchers (*kasabs*) 3 in number, inhabitants of Batala, in the Gurdaspur District, put in a petition to the Deputy Commissioner of a by no means unusual character, stating that *bantias* and Hindu shopkeepers in Batala would not supply them, and asking the Deputy Commissioner to take measures for their relief. The shopkeepers were alleged to have formed a ring to boycott the butchers and to treat them with ignominy in the streets. The petition is not couched in violent language.

Upon this the Deputy Commissioner simply wrote the order “the *Tahsildar* will report “*Ba murad report pas tahsildar sahib mursil ho.*”

The *Tahsildar* sent a report, dated 23rd April 1908, saying that it was not shown that any ring or boycott had been established; that no doubt individual cases of dispute from ordinary causes had occurred; and that the Hindus repudiated all idea of refusing supplies for the future. Upon this, without any complaint by any one, without calling the petitioners before him, and without recording any English order, the Deputy Commissioner issued a vernacular order as follows :—

Zer dafī 182 Tazirāt-i-Ilād dārkhast dākhilgān par mubādilatī fājdari banaya jawe aur sapurd Sheikh Nasir ud-Din kia jawe. Court Inspector Sahib Police pairvi mukhadana kare, that is let the prisoners be prosecuted under Section 182. There has been no attempt to observe the provisions of Section 195, Criminal Procedure Code. I have no wish to interfere with the necessary discretion of Deputy Commissioners in such matters, or to criticize the wisdom of such an order as that before me, in support of which the learned Government Advocate appears. But when such discretion is exercised, the District Magistrate must be careful to see that the provisions of the law are carefully and properly observed and carried out.

I have no option but to set aside the order and quash the proceedings. The provisions of the Criminal Procedure Code, *inter alia*, section 190 *et seq*, including Section 195, must be strictly followed in such cases, a complaint formally made in some shape and cognizance taken of such a complaint. A vernacular order passed by an executive officer and merely bearing some more or less illegible initials directing a subordinate magistrate to take up a case under section 182 is not sufficient compliance with the requirements of the law.

The order directing the prosecution is set aside and quashed accordingly.

REFERENCE SIDE

FULL BENCH.

CIVIL

No. 212

Before Sir William Clark, Kt., Chief Judge, Mr. Justice Chatterji.

C. I. E., and Mr. Justice Johnstone.

SHER ALI SHAH,—(PLAINTIFF),—APPELLANT,

versus

LACHMAN DAS AND OTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 55 OF 1907.

Civil Procedure Code (Act XIV of 1882) Section 233—Declaratory suit—Execution of decree—Attachment.—Objection against—Jurisdiction of Court—Valuation of suit—Punjab Courts Act (XVIII of 1884) Section 39.

The value for purposes of jurisdiction of a suit filed under Section 233 of the Civil Procedure Code by an objector whose claim to attached property is dismissed under Section 282 for a declaration that the property in suit

belongs to him and not to the judgment-debtor who claims it as his own and is not liable to attachment and sale is the value of the property and not the amount of the decree in execution of which it is attached.

Both parties absent.

ORDER OF REFERENCE TO A FULL BENCH.

JOHNSTONE, J. (18th November 1901).—This is a reference under Section 617, Civil Procedure Code from the Divisional Judge, Lahore, regarding the question of jurisdiction to hear a certain appeal. Defendant decree-holder in execution of his decree against his judgment-debtor, attached half of a certain house. Plaintiff, not a party to the decree, sued both decree-holder and judgment-debtor for a declaration, having first objected unsuccessfully under Section 278, C. P. C., that the property belonged to him and not to the judgment debtor and so was not liable to attachment. The property is worth Rs. 600 and the aforesaid decree was for Rs. 41-4 only. If the latter sum is taken as value of the suit, then the appeal lies to the District Judge; if Rs. 600 is the value, to the Divisional Court. The appeal having been filed in the District Court, the learned District Judge refused to hear it on the ground that it lay to the Divisional Court. The Divisional Judge when the appeal came before him, was disposed to agree with the District Judge, but has made this reference as the point is in his opinion, in consequence of certain conflicting authorities, doubtful. It should be noted too that in his plaint the objector alleges that the judgment-debtor is in collusion with the decree-holder and resists the suit, claiming the property as hers. This appears to be true, at least as regards the claim of the judgment-debtor ownership to the exclusion of plaintiff.

The way I look at the matter is this. The law is contained in Section 39, Punjab Courts Act, 1884, and what has to be considered is the value of the suit, i. e., the value, calculated according to law, of the subject-matter of the suit. The possible suits in connection with attachment of property, i. e., the possible suits under Section 283, C. P. C., are these:—

- (a) When property attached has been released on objection, suit by decree-holder for a declaration that the property is liable to attachment;
- (b) When property attached has not been released, the objection being disallowed, suit by the objector against the decree-holder

to declare the property not liable, the judgment-debtor siding with the objector and not claiming the property as his;

- (c) When property attached has not been released, objection being disallowed, suit by the objector against the decree-holder and the judgment-debtor to declare the property not liable, the judgment-debtor resisting the suit and claiming the property as his and the plaintiff asserting that this is judgment-debtor's attitude.

Suppose in all these cases the decretal amount is less than the value of the property, I would hold that in class (a) "the subject-matter of the suit" was the decretal amount. This is all the decree-holder really wants. In class (b) I would rule that probably the subject-matter of the suit was the decretal amount. Objector-plaintiff's title to the ownership of the property as such is safe, inasmuch as the judgment-debtor admits it; and what the plaintiff wants is merely a declaration that the decree-holder is not entitled to realise out of the property the sum decreed in his favour.

But class (c) seem to me on an entirely different footing, and the present suit belongs to that class. All order has been passed by the execution Court, which, if not set aside or overruled, will result in the loss to the objector not of the decretal amount but of the whole property attached. That property will be sold, and part of the proceeds having been paid to the decree-holder, the rest will go to the judgment-debtor, the objector getting nothing. It is to avert this calamity that the objector brings his suit. He wants an order which will not only prevent the decree-holder from realising his claims out of the property but will also prevent the judgment-debtor from appropriating the surplus left after the satisfaction of the decree. In short, the suit is for the property *in toto*.

I will now examine the authorities I have been able to find and see to what extent they support or militate against these views. The learned Divisional Judge quotes 5 *P. R.* 1890, but I am unable to see any relevancy in that ruling, and probably there is a misquotation. Next comes 121 *P. R.* 1890; this is a case under class (a) aforesaid, and is in

accordance with my *dictum* recorded above; thirdly, we have 55 *P. R.* 1906, S. C., 71 *P. L. R.*, 1906, a ruling by a single Judge of this Court. It comes under class (b), and I approve of the decision, though not altogether of the way in which the reasons for it are put. Similarly in 142 *P. R.* 1906 S. C., 63, *P. L. R.*, 1907, which followed 55 *P. R.* 1906, S. C., 71 *P. L. R.*, 1906 the judgment-debtor did not resist the claim but actually gave evidence in favour of plaintiffs. Fourthly in *I. L. R.* XV *Calcutta* 104, the High Court decided a case falling under class (a) as I would decide it. Fifthly, we have the doubtful case published at *I. L. R.* II *Allahabad* 799. There the objector brought the suit, his objection to attachment having been dismissed, and it was held that the value of the suit was the decretal amount and not the value of the attached stuff. The judgment is very brief, and it is not stated whether the judgment-debtor claimed to own the property or whether he admitted the objectors' title to it. If the former was the case, then in my opinion the decision was unsound. Lastly, in *I. L. R.* XVII *Allahabad* 69, the High Court, distinguishing the aforesaid earlier ruling of the same Court, laid it down that when in a suit under Section 283, C. P. C., Act XIV of 1882, the claimant-objector, makes the judgment-debtor party as defendant (meaning, I take it, real defendants and not merely defendants *proforma*) to the suit, the property attached must be regarded as the "subject matter of the suit," and the value of the suit must be the value of the property attached whether that value exceeds or is less than the decretal amount. The learned Judges make use of arguments that have my entire assent, pointing out among other things that the title to the whole of the property in the case put—which is similar to my class (c) above—will become *res judicata* as between all the parties to the suit.

My views have been stated above, and I am unable to find any directly conflicting authority; but if my learned colleague would like the case to go to a Full Bench I have, of course, no objection.

CHATTERJI, J.—I think there is much force in my learned brother's reasoning, but having regard to the apparent conflict of rulings and the fact that the suit is one of the nature spoken of in Section 283, C. P. C. I consider the case ought to be referred to a Full Bench for an authoritative decision on the question of valuation for purposes of jurisdiction.

JUDGMENT OF THE FULL BENCH.

CLARK, C. J., (CHATTERJI AND JOHNSTONE, JJ (17th January 1908).—For the reasons given in the referring order we hold that the proper valuation of this case for purposes of jurisdiction is the value of the property attached and not the decretal amount.

We therefore return the papers to the Divisional Court with the direction that inasmuch as the appeal lies to his Court he should proceed to hear it.

Case returned to the Divisional Judge.

APPELLATE SIDE.

No. 213.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

HAIDER ALI,—(PLAINTIFF),—APPELLANT,

versus

GHULAM MUHAMMAD AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 264 OF 1908.

Custom—Pre-emption—Houses—Mohalla Karor Khan of Jullundur city.

Held, that the plaintiff had failed to prove that the custom of pre-emption in respect of houses existed in *Mohalla Karor Khan* of Jullundur city.

Further appeal from the order of the Divisional Judge, Jullundur Division, dated the 15th August 1907.

Pandit Sheo Narain, Pleader for Appellant.

Lala Dwarka Das, Pleader for Respondents.

JUDGMENT.

CLARK, C. J.—(7th December 1908).—The decisions of the lower Courts as to whether this house is situated within *Mohalla Karor Khan* or not are not satisfactory. But assuming that the house is within *Mohalla Karor Khan*, I think that plaintiff must fail owing to his not having proved that the custom of pre-emption exists in that *Mohalla*.

Jullundur was a walled city and has a circular road round it, and this *Mohalla* lies outside the circular road to the north of the city.

The fact that a custom of pre-emption exists inside the city does not raise any strong presumption that it exists in a *Mohalla* outside the city, as held in Civil Appeal No. 751 of 1905. It lies upon plaintiff to prove the existence of this custom. He quotes 3 cases.

1. *Janu versus Pir Bakhsh*, decided on 24th November 1887.
2. *Wazira versus Nathu*, decided on 5th September 1888.
3. *Miran Bakhsh versus Imam Din*, decided on 30th November 1896.

The values of these cases were Rs. 50, 18 and 55 respectively. So they are very petty cases not worth much of a struggle. Nos. 1 and 2 never went beyond the *Munsif's* Court, No. 3 was appealed to the District Judge.

No. 1 was decided by arbitration.

„ 2 by admission of right of pre-emption.

„ 3 followed the decision in No. 1.

They were all cases by tenants with rights of occupancy against tenants. None of them was a case between owners as this one is.

I do not think that these cases are sufficient to prove the existence of a custom of pre-emption in the *Mohalla*.

It is true that Civil Appeal No. 472 of 1904 did not decide that the custom of pre-emption does not prevail in *Mohalla* Karor Khan and dismissed the claim on other grounds ; but this does not relieve plaintiff from the *onus* of proving the existence of the custom in the *Mohalla*.

I agree with the lower Courts that this has not been proved and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE SIDE.

NO. 214.

CIVIL.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

VAISHNO DAS,—(PLAINTIFF),—APPELLANT,

versus

Mussammat DEOKI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

CASE No. 437 OF 1908.

Hindu Law—Document, construction of—Will in favor of female—Malik waris.

Held, that a will in favor of a Hindu female conferring upon her rights of an owner and heir gives her heritable and transferable rights in the property bequeathed to her *I. L. R., XXX, All. 84 P. C. referred to.*

Further appeal from the decree of the Divisional Judge, Amritsar Division, dated the 7th March 1908.

Mr. Dwarka Das, Pleader for Appellant.

Mr. Lal Chand, Advocate for Respondent.

JUDGMENT.

CLARK, C. J. AND REID, J.—(21st December 1908).—The sole contention for the appellants is that the testator did not intend to confer on his daughter-in-law, *Mussammat* Malan, more than a life-estate in the property in suit and that the will did not convey more,

The words used were *malik wariis hogi*. These words in our opinion convey as large powers of alienation as the words *malik wa khud ikhtiyar*, interpreted by their Lordships of the Privy Council in *Surajmoria versus Rebi Nath Ojha*, I.L.R., XXX All. (P.C.), 84, to convey a heritable and transferable estate in the subject-matter of the deed in suit. The power of the testator to convey such an estate has not been contested.

The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE SIDE.

No. 215.

CIVIL.

Before Mr. Justice Shah Din.

KIRPA RAM,—(PLAINTIFF),—APPELLANT,

versus

HIRA NAND AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

CASE No. 579 OF 1908.

*Punjab Courts Act (XVIII of 1884) as amended, Section 39—
Appeal—Valuation of suit—Pre-emption suit—Transfer of appeal.*

In a suit for possession of land by right of pre-emption, in ascertaining the value for purposes of jurisdiction the Court has to look in the first place to the amount calculated on the basis of thirty times the revenue, and, in the second place, to the amount on the payment of which the pre-emptor is entitled under the decree to obtain possession of the land.

Held, that an appeal by a pre-emptor against a decree dismissing his suit for pre-emption of revenue paying land sold for more than Rs. 5,000, does not lie to the Chief Court, for the course of appeal in the first instance is determined by the value of land calculated on the basis of thirty times the revenue. In such case if the appeal is filed directly in the Chief Court, the Court will decline to order its transfer to its own file, 16 P.R., 1908 F. B., S.O., 146 P. L. R. 1908, F. B., 46 P.R. 1908, S.O., 172 P.L.R., 1908, *referred to*.

First appeal from the order of Sheikh Amir Ali, District Judge, Gujrat, dated the 9th August 1907.

Mr. Vishno Singh, Advocate, for Appellant.

Messrs. Lal Chand and Nanak Chand, Advocates, for Respondents.

JUDGMENT.

SHAH DIN, J.—(10th November 1908).—Mr. Lal Chand, for the respondent Ram Rattan, vendee, contends that since the subject-matter of a pre-emption suit which relates to revenue paying land is not merely the land, but also, as the learned advocate puts it, the purchase-money as entered in the sale-deed which has to be paid to the vendee as a condition precedent to the pre-emptor obtaining possession of the property sold, the jurisdictional value of the present suit for pre-emption, which relates to land sold for more than Rs. 5,000, must be held to exceed that figure and that an appeal lies to this Court from the decree of the District Judge, although the decree is one dismissing the plaintiff's suit. I cannot agree with this contention. In my opinion the subject-matter of the present suit is the land in dispute, and nothing more; and I certainly think that in ascertaining its value for purposes of jurisdiction we have to look in the first place to the amount calculated on the basis of thirty times the revenue; and in the second place to the amount, if any, on the payment of which to the vendee the pre-emptor is entitled under the decree to obtain possession of the land. The reasoning on which the Full Bench ruling in No. 16, *P.R.*, 1908, *F. B.*, *S. C.*, 146 *P.L.R.*, 1908, proceeds fully supports the view I am prepared to hold, which is also fortified by the decision of the learned Chief Judge reported as No. 46, *P. R.*, 1908, *S. C.*, 172 *P. L. R.*, 1908.

I therefore overrule the learned advocate's contention, and hold that the value of the present suit, which has been dismissed by the District Judge, is thirty times the *jama* of the land in dispute, and that the Divisional Judge had jurisdiction to hear the appeal.

Next Mr. Lal Chand requests that in view of the possibility of the Divisional Judge holding that the plaintiff is entitled to a decree by pre-emption for possession of the land on payment of more than Rs. 5,000 to the vendee, in which case his jurisdiction to hear and determine the appeal would be ousted, this Court may in the interests of the parties transfer the appeal to its own file. The counsel for the appellant strongly objects to this course being adopted on the ground that his client will in that event lose the opportunity of obtaining the opinion of the Divisional Judge on the questions decided by the District Judge and on the further question of the market-value of the land, if the Divisional Judge were to come to the conclusion that the price entered in the deed of

sale was not entered in good faith and greatly exceeded the real value of the land.

I think there is force in this objection and I decline to order the transfer of the appeal to this Court.

The memorandum of appeal filed in the Court of the Divisional Judge is returned, with a direction that the learned Judge should dispose of it in accordance with law. His order of 5th May 1908, as regards costs, is set aside. I leave the parties to bear their own costs in this Court.

APPELLATE SIDE.

No. 216.

CIVIL.

Before Mr. Justice Robertson.

KHUDA BAKSH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

versus

IMAM DIN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

CASE No. 1296 OF 1906.

Custom—Alienation by sonless proprietor—Kashmiris of Panjorian village in the Gujrat District.

Held, that the parties to the case, Kashmiris of Panjorian village in the Gujrat District, though living largely on agriculture, were not shown to have been governed by agricultural custom, and Muhammadan Law was therefore applicable to the case.

Further appeal from the order of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 3rd October 1906.

JUDGMENT.

ROBERTSON, J.—(16th May 1907.)—The only question before me is whether the parties, who are Kashmiris, settled in a village in the Gujrat District, are, in matters of alienation, governed by the custom of the agriculturists among whom they dwell or not. They are certainly a separate community, differing in race from the *Jats* of the village, and though they live, so it is found, largely by agriculture, they are also weavers and make and sell cloth. In the *Shajra Nasab* of 1869 of the village it is entered that in 1844, *Sambat* 1891, certain persons restarted

the village, among them were certain Kashmiris who came from the village of Doga.

The ancestor of these Kashmiris came into the village when it was rehabilitated in, and they have held and cultivated land in the village ever since. The question is, are they, as regards alienations, bound by the agricultural custom of their neighbours, the *Jats*? On a full consideration of the case I see no sufficient reason to hold that the power of alienation among the Kashmiris of *Mauza* Panjorian is limited in the same way as it is with *Jats*. There is no instance put forward of an alienation by a Kashmiri ever having been restrained by collaterals. They are perhaps mainly, but they are not exclusively, employed in agriculture. They are a community apart. And between 1886 and 1899 it is shown that there have been no less than three uncontested alienations by Kashmiris in this very village. Now I quite agree that one or two instances of uncontested alienations would not be evidence of much value. The neglect to contest might be due to various causes. But when we have a long string of 38 instances in one village within a few years, I think it is quite impossible to hold that it has been established that Kashmiris of that village are governed by the same restrictions on alienations as are operative under the customary law of the neighbouring tribes. I think it lay upon the plaintiffs to establish that such a custom obtains among the Kashmiris of *Mauza* Panjorian, and I think he has quite failed to do so. No entry regarding Kashmiris has been quoted from the *Riwaj-i-am*. I accordingly accept the appeal and dismiss plaintiffs' suit with costs throughout.

Appeal accepted.

APPELLATE SIDE.

NO. 217.

CIVIL.

Before Mr. Justice Chatterji, C. I. E., and Mr. Justice Rattigan.

RANJHA,—(PLAINTIFF),—APPELLANT,

versus

BULANDA,—(DEFENDANT),—RESPONDENT.

CASE No. 1387 OF 1907.

Custom—Succession—Chundawand and Pagwand—Gujars of Hailakh village, Shakargarh tahsil, Gurdaspur District.

Held, that the party who alleges, that *chandawand* and not *pagwand* rule of succession governs his case is bound to establish the allegation, and that such custom

was not proved to exist among *Gujars* of Hailakh village, Shakargarh *tahsil* of Gurdaspur District, 184 *P.R.* 1892, 74 *P.R.* 1898, 46 *P.R.* 1897, 12 *P.R.* 1899, 22 *P.R.* 1899, 29 *P.R.* 1900, S.C., *P.L.R.*, 1900, P. 442, 148 *P.R.* 1908 referred to; 101 *P. R.* 1879 followed.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 1st October 1907.

Mr. Gulu Ram, Advocate for Appellant.

JUDGMENT.

CHATTERJI, J.—(24th July 1908.)—The plaintiffs are four sons by one wife of one Dalmir, a *Gujar*, landowner of Hailakh in the Shakargarh *tahsil* of the Gurdaspur District, while defendant is his single son by another wife. The dispute between the parties is as to the application of the rule of *pagwand* or *chundawand* in the division of the paternal estate, and the plaintiffs have sued for a declaration that the former governs them. On the death of the father mutation was made in the parties' names on the *chundawand* principle in 1899, but plaintiffs have held possession of a much larger portion of the land than the defendant, the *khata* being joint. The defendant in consequence applied for partition in 1906 in accordance with the revenue entry, and plaintiffs objecting to it have been referred to the Civil Court, and have accordingly brought the present suit.

In the *Riwaj-i-am* of 1865 of the Shakargarh *tahsil* it was recorded that *chundawand* was the custom of the *Gujars*. The parties' father wrote a will in 1898, a few months before his death, in which he stated that though the old custom was *chundawand* he considered that all sons should get equal shares, and directed that division should take place on this principle after his death. The inquiries made at the time of the last Settlement, however, showed that the custom had largely fallen into disuse, and it was recorded that the custom of the *Gujars*, except in a very few villages, was *pagwand* (*vide* Dane's Customary Law of Gurdaspur, page 13). What these villages are it is not possible to discover from the present record or from the vernacular records of customs in the Chief Court. But it is evident from Mr. (now Sir Louis) Dane's summary that the great majority of the *Gujars* stated at the time of the recent Settlement that their custom was *pagwand* and not *chundawand*. The later record is quite as valuable

as the earlier *Riwaj-i-am*, if not more so, and we do not see why it should be an inflexible presumption that the previous *Riwaj-i-am* correctly records the custom. Had the village of Hailakh been among the exceptions noted in the new *Riwaj-i-am* or in the answers of the *Gujar* tribesmen, the parties would probably have brought out the fact. As the case stands at present we are inclined to think that the old record of custom is sufficiently rebutted by the new one.

The mention of the *chundawand* rule in the father's will may be a point in favour of defendant's contention, but he is, perhaps, referring to the entry in the old *Riwaj-i-am*, and he also mentions the contrary practice as entered in the Settlement records. He wrote apparently in ignorance of the answers given at the last Settlement. His statement therefore does not weigh much under the circumstances, and he clearly gives preference to the new rule that had come into vogue. We do not think the will can materially influence the decision of the case.

The oral evidence of the parties is not of much value by itself, but a much larger number of persons have deposed in favour of the plaintiffs' contention, while only two witnesses appeared for the defendant.

The Naib Sadar Kanungo deposed to two recent instances in support of the rule of *pagwand* from the Revenue records, and copies of two other mutation entries from two other villages of the Shakargarh *tahsil* have been produced to the same effect. There is also an old case of 1873 in which the plaintiff, after suing for division according to *chundawand*, ultimately agreed to take his share under the *pagwand* rule. Dane's Customary Law gives these instances, as well as many more, among *Jats* of Shakargarh, Batala and Gurdaspur *tahsils*.

On defendants' side there is only one alleged instance deposed to by Imam Din, *lambardar*, who says he got half a share of his father's property and his two half brothers the other half, and that mutation took place to this effect two or three years ago. The entry itself was not produced, and the instance depends entirely on the statement of this witness.

It has been laid down in several judgments of this Court that *chundawand* is slowly giving place to *pagwand* wherever it was in force; see *Hukam Singh v. Sohet Singh* 134 P. R., 1892, and *Kundan v. Sundar Singh*, 74 P. R. 1898. The inquiries made at the recent Settlement seem to bear out this conclusion. The binding force of custom depends on the state of public opinion. It is undoubted, as

stated in *Dhyan Chand v. Mehtab Singh*, 101 P. R. 1879, that *pagwand* is the universal customary rule and is the only one recognized by the personal law of Hindus and Muhammadans, and *chundawand* is the exception, though it may date from ancient times, see also *Sant Singh v. Sohan Singh*, 46 P. R. 1897, *Kundan v. Sundar Singh*, 74 P. R. 1898, *Gopal v. Shawag Ram*, 12 P. R. 1899, *Ghulam Muhammad v. Abbas Khan*, 22 P. R. 1899, and *Hayat Muhammad v. Nawab* 29 P. R. 1900; S. C., P. L. R., 1900, p. 442. An exception to the ordinary rule may become obsolete by not being enforced.

In a recent case *Labh Singh v. Sundar Singh*, 148 P. R., 1908 from the Gujranwala District among people who were alleged to have come from Gurdaspur we have had occasion to discuss the question arising in this case. For the reasons given in our judgment in that case in addition to what we have said above, we think that the rule of *chundawand*, if it was in force among the parties' tribe and family, has fallen into disuse, and that the present rule is *pagwand*.

We accept the appeal and restore the decree of the first Court. In consideration, however, of the peculiar circumstances of the case and the mutation entry in defendant's favour, which has not been challenged for several years, we let the parties pay their own costs throughout.

Appeal allowed.

REVISION SIDE.

No. 218.

CIVIL.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

KHAGINDRA NATH DAS,—(DEFENDANT),—PETITIONER,

versus

NANAK CHAND,—(PLAINTIFF),—RESPONDENT.

CASE NO. 42 OF 1908.

*Hindu Law—Father's debts—Liability of estate after father's death
—Price of liquor supplied to father.*

Held, that according to both *Mitakshara* and *Dayabhaga* schools of Hindu Law, joint family property in the hands of the son is not liable for the debt contracted by his deceased father for liquor supplied to the latter.

*Petition for revision under section 25 of Act IX of 1887, for revision
of the order of Rai Bahadur Lala Mul Raj M. A., Judge, Small*

Cause Court, Lahore, dated the 22nd July 1907, decreeing the plaintiff's claim.

Mr. M. N. Mukerjee, Pleader for Petitioner.

Mr. Obedullah, Pleader for Respondent.

ORDER OF REFERENCE TO A DIVISION BENCH.

REID, J.—(29th April 1908).—This application raises a question of considerable importance, not covered by authority of this Court or, indeed, by any authority of the Court cited at the hearing. The text books on Hindu Law, while emphasizing the distinction between the father's powers of alienation during his life, and between the nature of the estate taken by sons, under the *Mitakshara* and the *Daya Bhag*, do not distinguish in so many words between the liability of the estate in the hands of the sons for the father's debts under the two schools of Law. I refer the appeal to a Division Bench.

JUDGMENT OF THE DIVISION BENCH.

CLARK, C. J., AND REID, J. (6th November 1908).—The order referring this case to a Division Bench will be read with this.

The question for consideration is whether the joint family property is liable in the hands of the son for the debt contracted by his deceased father for liquor supplied to the latter. The pleader for the respondent contended that section 73 of the Contract Act superseded the Hindu Law on the point, but was unable to cite any authority, and we have no hesitation in over-ruling the contention. The parties are bound by the personal law of the debtor who was governed by the *Daya Bhag* school of Hindu Law. The rules of that school relevant to the case do not appear to differ from the *Mitakshara*, which are set out in section 303 of Mayne's Hindu Law, Edition 7th; Part V, Chapter IX of Bhattacharya's Hindu Law, Edition 2nd; pages 449 to 452 of Ghose's Hindu Law, Edition 2nd, and ample authority from which Jimuta, Vahana and Jagannatha apparently did not dissent, is cited by these commentators for holding that the property in the hands of the appellant is not liable for debts contracted for liquor supplied to his father. His personal liability is equally regulated by these authorities. Had the suit been instituted before the father's death, the respondent might have been in a stronger position, but it is unnecessary to discuss this aspect of the case, the suit having been instituted after the father's death.

The application under section 25 of the Small Cause Courts Act is allowed and the suit is dismissed with costs.

Application allowed.

REVISION SIDE.

No. 219.

CIVIL.

Before Sir William Clark, Kt., Chief Judge.

DARYA DITTA AND ANOTHER,—(PLAINTIFFS),—PETITIONERS,

versus

MANA SINGH,—(DEFENDANT),—RESPONDENT.

CASE No. 1023 OF 1908.

Punjab Land Alienation Act (I of 1900), as amended by Act I of 1907—Section 21—Decree passed in violation of the Act—Procedure.

A decree for possession of land was passed in favour of plaintiffs without regard to the provisions of section 3 of the Punjab Land Alienation Act. In execution of the decree possession of the land was delivered to the plaintiffs.

The plaintiffs sued again for possession alleging a subsequent ouster from the land by the defendant. The decree passed in the former suit was treated as a nullity and the suit was dismissed.

Held, that the fact that the decree was passed in violation of the terms of the Punjab Land Alienation Act did not render it a nullity. The decree was open to appeal or revision and unless set aside could not be treated as a nullity.

Held, also, that the defect noticed in the case was provided for by section 9 of Act I of 1907, amending the Punjab Land Alienation Act, that the proper course to be adopted in such a case is to bring the former decree to the notice of the Deputy Commissioner and await for the prescribed two months any action taken by him under section 21A of the Act. If he takes action the course of the suit should be determined by any alteration made in the decree.

If he takes no action, the suit must be disposed of on the understanding that the decree is a valid one.

Petition for revision under Section 70 (1) (b) of Act XVIII of 1884, as amended by Act XXV of 1899, against the order of T. G. Kennedy, Esquire, Divisional Judge, Ferozepore Division, dated the 12th December 1907, confirming that of Bhai Anokh Singh, Munsif, II Class, Fazilka, District Ferozepore, dated the 16th August 1907, dismissing plaintiffs' claim.

Pandit Sheo Narain, Pleader for Petitioner.

JUDGMENT.

CLARK, C. J.—(1st December 1908.)—Plaintiff sued for possession of certain land on the strength of a conditional sale, and defendant compromised the case receiving a money payment, and a decree for

possession of the land was passed on 18th May 1903 and possession was given to plaintiff in execution of decree on 3rd August 1904. Plaintiff now sues again for possession, alleging a subsequent ouster from the land by defendant.

Plaintiff is a non-agriculturist, and defendant is a member of an agricultural tribe.

Under clause 3 (2) of the Punjab Land Alienation Act a permanent alienation of land shall not take effect until sanction is given by the Deputy Commissioner.

The Courts below have on this ground treated the decree of 18th May 1903 as a nullity and have dismissed plaintiff's suit.

The fact that that decree was passed in violation of the terms of the Punjab Land Alienation Act does not render it a nullity. The decree was open to appeal or revision, but, unless set aside, it cannot be treated as a nullity. It was not a decree passed without jurisdiction.

This defect here noticed is provided for by section 9 of Act I of 1907 amending the Punjab Land Alienation Act. This section provides that every Civil Court passing a decree involving the permanent alienation of his land by a member of an agricultural tribe shall send a copy of its decree to the Deputy Commissioner, and it provides for the Deputy Commissioner intervening when a decree has been passed contrary to the provisions of the Act, and this provision applies to decrees passed before as well as after the coming into force of the section. I accept this revision and set aside the orders of the Courts below dismissing plaintiff's suit and remand the case for disposal under section 562, Civil Procedure Code.

Probably the best course for the Divisional Judge to pursue would be to bring the decree of 18th May, 1903, to the notice of the Deputy Commissioner, and await for the prescribed 2 months, any action taken by him under section 21A of the Act. If he takes action, the course of this suit will be determined by any alteration made in the decree of 18th May 1903.

If he takes no action, the suit must be disposed of on the understanding that the decree of 18th May 1903 is a valid decree.

Court-fee on this revision will be refunded, other costs will be costs in the case.

Petition accepted.

End of Volume IX.

SUMMARY OF RECENT CASES.

(Decided by the Punjab Chief Court and the Financial Commissioner, Punjab).

(The important ones to be fully reported hereafter.)

FULL BENCH.

No. 1.

*Sir William Clark, Kt., C. J.,
Robertson & Shah Din, JJ.*

C. A. No 548 of 1906.
23RD, 24TH AND 25TH MAY, 1907.

Cause of action—Pre-emption—Devolution by inheritance.

The right to sue for pre-emption upon a cause of action which has accrued to a person in his lifetime passes at his death to his successors on their inheriting his land which gave him the right to pre-empt.

Messrs. Grey and Roshan Lal, Advocates, for Appellant.

Messrs. Oertel and Harris, Advocates, for Respondents.

FAQIR ALI SHAH v. RAM KISHEN.

FULL BENCH.

No. 2.

*Sir William Clark, Kt., C. J.,
Chatterji & Johnstons, JJ.*

C. A. No. 1209 of 1906.
26TH JULY, 1907.

Custom—Succession—Sister not entitled to succeed as daughter of father of deceased.

Held, that when a proprietor following the Customary Law dies leaving a sister she cannot claim to succeed the land left by him as daughter of his father. She may succeed as sister only when custom recognizes her right as such.

Bhagat Gobind Das, Pleader, for Appellants.

Rai Bahadur Bakhshi Sohan Lal, and Pandit Sheo Narain, Pleaders, for Respondents.

HAMIRA v. RAM SINGH.

No. 3.
Sir William Clark, Kt., C. J.

C. R. No. 97 OF 1907.

2ND MAY, 1907.

Civil Procedure Code (Act XIV of 1882), Section 53—Specific Relief Act (I of 1877), Section 42—Amendment of plaint—Declaratory suit—Plaintiff omitting to pray for further relief.

It is most desirable, whenever possible, that Court should settle the dispute that has arisen between the parties, and if necessary plaint may be allowed to be amended.

When the appellate Court dismissed the claim on the ground that the plaintiff had omitted to pray for further relief, the Chief Court, on revision, set aside the order of dismissal and ordered re-trial of the appeal after allowing amendment of the plaint.

Mr. Devi Dial, Advocate, for Petitioner.

Sardar Kharak Singh, Pleader, for Respondent.

HAZARA v. BISHEN SINGH.

No. 4.*Sir William Clark, Kt., C. J.*

C. A. No. 355 OF 1906.

6TH APRIL, 1907.

Interest—Appeal—Discretion of Court—Appeals about trifles when there has been substantial justice done should be discouraged.

The Original Court allowed interest to the plaintiff at Rs. 1-8 per cent. per month. The defendant appealed and the appellate Court allowed interest at Rs. 1 per cent. per mensem. On second appeal the plaintiff claimed interest at Rs. 2 per cent. per mensem. The Chief Court dismissed the second appeal with the observation that the parties would have been well advised if they had accepted the decision of the Original Court.

Mr. M. S. Bhagat, Advocate, for Appellant.

Chaudhri Shahab-ud-din, Pleader, for Respondents.

RAM MAL v. SHAHAMAD KHAN.

No. 5.*Johnstone & Rattigan, JJ.*

C. A. No. 683 OF 1906.

21ST & 23RD JANUARY, 1907.

Regulation XVII of 1806, Sections 7 and 8—Mortgage by way of conditional sale—Foreclosure—Notice. Irregularities in—Appeal—Objections raised for the first time on appeal.

In a suit for possession of mortgaged property on the ground that after proceedings under Regulation XVII of 1806, the plaintiff had become full owner

of the property, the defendants admitted receipt of the notice under Regulation XVII of 1806, but pleaded that the plaintiff had made no demand as required by law. The Court rejected the plea and decreed the suit. On appeal the defendants contended that the notice was defective, because (1) area of land and *khasra* and *khawat* numbers were entered neither in the notice nor in the application for its issue; (2) the amounts of principal and interest were not specified in the notice; and (3) the signature of the District Judge on the notice was not his proper official signature, the words "District Judge" being printed in vernacular below the signature, instead of being in the Judge's own hand.

Held, that the contentions were not valid.

Per Johnstone, J.—That the contentions could not be raised for the first time on appeal.

BHAGIRATH *v.* NATH MAL.

No. 6.

Johnstone & Ruttigan, JJ.

C. A. No. 480 OF 1906.
22ND JANUARY, 1907.

Punjab Limitation Act I of 1900 (Local)—*Suit by after-born son to recover possession of ancestral land transferred by his father.*

The Punjab Limitation Act applies to all cases falling within its purview instituted after its coming into force.

A soulless *Gujar* made a gift of his ancestral land in 1877 and mutation thereon was effected in 1878. For about ten years he remained soulless, one son being born to him in 1887, and another in 1888. The donor died in 1908 and his sons brought the present suit in 1905 against the donee to recover the gifted property.

Held, that the suit was barred by limitation and the plaintiffs' minority had not the effect of extending the period of limitation.

Mr. Jalal-ud-din, Advocate, for Appellants.

Mr. Fazal-i-Hussain, Advocate, for Respondents.

INAYAT KHAN *v.* SHABU.

No. 7.

Johnstone, J.

C. R. No. 372 OF 1905.
30TH OCTOBER, 1906.

Pre-emption—Transfer by vendee before suit for pre-emption is filed—Right of pre-emptor, who has obtained decree against vendee alone, to sue transferee—Limitation Act (XV of 1877), Schedule II, Article 10.

The vendee exchanged some of the land purchased by him with the land belonging to the present defendants. Subsequently the plaintiff obtained a decree against the vendee alone by right of pre-emption for possession of the land purchased by him. Not being able to obtain possession of the land transferred by the vendee to the present defendants, the plaintiff filed the present suit against them.

Held, that the suit must be regarded as one for pre-emption, and not having been filed within the period of limitation prescribed therefor must be dismissed as barred by limitation.

*Mr. Roshan Lal, Advocate, and Lala Gopal Chand, Pleader, for Petitioner.
Mr. Ganpat Rai, Advocate, for Respondent.*

RAUSHAN v. MAKHAN.

No. 8.

Chatterji & Johnstone, JJ.

C. A. No. 759 OF 1906.
11TH JUNE, 1907..

Court Fees Act (VII of 1870), Sections 6, 28—Limitation Act (XV of 1877), Section 4—Civil Procedure Code (Act XIV of 1882), Section 54—Court-fee—Plaint insufficiently stamped when filed—Registered by order of Court—Deficiency made up after expiry of limitation period prescribed for suit.

Held, (1) That the word "presented," in the Explanation to Section 4 of the Indian Limitation Act, should be interpreted in accordance with the provisions of the Code of Civil Procedure, Section 48.

(2) That the Court Fees Act and the Civil Procedure Code should be read together in regard to the presentation of plaints and the making up of stamp-duty, but not with the provisions of the Limitation Act, which is not an Act pari materia.

(3) That under Section 54 of the Civil Procedure Code and Section 28 of the Court Fees Act deficiency in stamps can be made good by order of Court irrespective of the question whether on the date of filing them the limitation for the suit has expired or not.

(4) That under Section 28 of the Court Fees Act on the making up of the deficiency of stamp-duty by order of Court the plaint and all proceedings relative thereto are validated from the date of original presentation, even though the limitation for the suit had since expired.

(5) That once the stamps are taken by the Court, the order cannot be subsequently set aside, nor the validation of the original presentation annulled.

Mr. Muhammad Shafi, Advocate, for Appellant.

Mr. Oertel, Advocate, for Respondents.

SAIF ALI KHAN v. FAZL MEHDI KHAN.

No. 9.

Reid, C. J.

C. A. No. 290 OF 1906.
18TH JULY, 1906.

Civil Procedure Code (Act XIV of 1882), Section 558—Appeal dismissed for default—Sufficient cause—Early hearing.

When it appeared that the appeal was dismissed in default at 11-30 A. M., and the Appellate Court left the Court at about 12-30 P. M., while the Appellant was preparing an application for restoration, the Chief Court set aside the order of dismissal and ordered the appeal to be heard on the merits.

Mr. Fazal Husain, Advocate, for Respondents.

NABI BAKHSH v. ABU SOMAD KHAN.

No. 10.*Johnstone & Hurry, JJ.*C. A. No. 816 OF 1905.
7TH JULY, 1906.*Civil Procedure Code (Act XIV of 1882), Sections 37, 51, 578—Recognized agent—Local agent is not a recognized agent.*

A defendant is entitled to question the authority of an agent to file a suit on behalf of his principals, as if the authority is defective he is liable to be sued afresh at the instance of the principals. The defect in the authority cannot be cured under Section 578 of the Civil Procedure Code.

In the Punjab a plaintiff can verbally authorise any person to file a plaint or act on his behalf in the suit brought by him.

Where a suit was filed by a local agent of the plaintiffs, who lived abroad, without any authority from them, after an alleged permission from the recognized agents of the plaintiffs in India—

Held, that the plaint not having been filed by a competent person was invalid, and as no attempts were made to cure the defect at earlier stages of the case the suit ought to be dismissed.

The Hon'ble Mr. Muhammad Shah Din, K. B., Advocate, for Appellants.
Lala Ishwar Das, Pleader, for Respondents.

FATEH DIN *v.* RALLI.

No. 11.*Rattigan & Lal Chand, JJ.*C. A. No. 1270 OF 1906.
3RD JUNE, 1907.*Punjab Laws Act (IV of 1872), Section 5—Custom—Muhammadan Law—Succession—Collateral succession—Right of sons of predeceased son—Right of representation—Shamsi Khojas of Lahore City—Hindu converts to Islam.*

Held, that in matters of succession *Shamsi Khojas* of Lahore City are governed by custom and not by Muhammadan Law; and that in accordance with custom, the son of a predeceased son of a collateral is not excluded from inheritance, but is entitled to succeed equally with his uncle.

Section 5 of the Punjab Laws Act makes no distinction between agriculturists and non-agriculturists. It lays down a rule of decision for all classes without distinction of caste, creed or calling.

There is no initial presumption that the parties who are townsmen are necessarily governed by the provisions of their personal law in matters relating to succession. The initial presumption, if at all, is in favour of their being governed by custom, which, however, being unavailable by a reference to textbooks as the personal law is, must in each case be ascertained by investigation and enquiry.

Cases relating to the same tribe, resident in different parts of the same district are relevant where there is uniformity of occupation and the caste forms a compact brotherhood bound together by rules of social intercourse.

Mr. Muhammad Shafi, Advocate, for Appellants.

Khawaja Kamal Din, Pleader, for Respondents.

MATAB DIN *v.* ABDULLAH.

No. 12.*Johnstone, J.*C. R. No. 444 OF 1904.
30TH OCTOBER, 1906.*Contract Act (IX of 1872), Sections 140 and 251—Partnership—Transfer of share—Liability of transferee.*

When a partner of a firm transfers his share in the partnership to a third party, and the transferee is admitted as a partner in the firm the latter becomes liable for the debts of the firm.

Rai Sahib Lala Sukh Dial, Pleader and *Mr. Harris*, Advocate, for Petitioner.
Mr. Gouldsbury, Advocate, for Respondents.

NIHARKU v. MADHO.

No. 13.*Chatterji & Johnstone, JJ.*C. A. No. 62 OF 1907.
9TH APRIL, 1907.*Civil Procedure Code (Act XIV of 1882), Section 539—Religious institution—Sanction of Collector—Amendment of plaint—Claim not agreeing with sanction.*

Where under Section 539 of the Civil Procedure Code sanction of the Collector was obtained to file a suit for appointment of a new trustee by Court, and it was prayed in plaint that power be given to the public for the appointment of a new trustee—

Held, that the suit was bad, for the claim was not covered by the sanction obtained in the case.

Held, also, that under the circumstances of the case amendment of the plaint could not be allowed.

Messrs. Grey and Duni Chand, Advocates, for Appellant.

Mr. Beechey, Advocate, for Respondents.

GANGA RAM v. RALLA SINGH.

No. 14.*Johnstone & Hurry, JJ.*C. A. No. 945 OF 1904.
28TH APRIL, 1906.*Custom—Pre-emption—Houses—Vicinage—Sale of two houses adjoining each other—Mohalla Jalotian in Lahore City.*

Where two houses adjoining each other, situate in *Mohalla Jalotian* of Lahore City, were simultaneously sold and the plaintiff's house was contiguous to only one of them—

Held, that the plaintiff was entitled to claim that house only which adjoined his house and had no right to the other house which adjoined the house of the defendant.

Mr. Ertel, Advocate, for Appellant.

Mr. Shelverton, Advocate, and *Lala Tirath Ram*, Pleader, for Respondent.

UTTAM CHAND v. LAHORI MAL.

No. 15.*Johnstone & Citty, JJ.*C. A. No. 863 OF 1903.
7TH NOVEMBER, 1906.*Civil Procedure Code (Act XIV of 1882), Section 13—Res-judicata—Competent Court—Course of appeal.*

The first suit was heard by a Subordinate Judge and his decision was appealed to the Divisional Judge, and the final judgment was passed in further appeal by a Single Judge of the Chief Court. In the subsequent suit, which was tried by the District Judge and was triable by Subordinate Judge also, appeal lay direct to the Chief Court. It was contended that the course of appeal in the two suits being different, the decision in the first suit did not operate as *res-judicata* in the subsequent suit.

Held, that the contention was not valid.*Mr. Muhammad Shafi*, Advocate, and *Lala Piare Lal*, Pleader, for Appellants.*Mr. Shadi Lal*, Advocate and *Mr. K.O. Chatterji*, Pleader, for Respondent.GIRDHAR LAL *v.* DEOKI NANDAN.

No. 16.*Ruttigan, J.*C. A. No. 1012 OF 1904.
16TH FEBRUARY, 1907.*Civil Procedure Code (Act XIV of 1882), Sections 562, 588—Appeal under Section 581, C. P. C. against order—Remand order not appealable.*

Held, that no appeal to the Chief Court lies against an order of remand passed under Section 562 of Civil Procedure Code in an appeal preferred under Section 588 of the Code against an order which is not a decree. *6 W. N. Cal.*, 585, *dissented from*.

Messrs. Petman and Roshan Lal, Advocates, for Appellants.*Rai Bahadur Bakhshi Sohan Lal*, Pleader, for Respondents.RAJ BHAI *v.* YAKUB ALI.

No. 17.*Johnstone & Lal Chand, JJ.*C. A. No. 121 OF 1907.
15TH JULY, 1907.*Limitation Act (XV of 1877), Section 5—Appeal—Death of party—Application for heirs to be brought on record—Sufficient cause—Delay.*

The delay in making an application for the legal representatives of a deceased party to be brought on record may be excused when it is shown that the applicant was unaware of the death of the party.

Mr. M. N. Mukerjee, Pleader, for Appellants.*Mr. Morrison*, Advocate, for Respondents.DADU *v.* KADU.

No. 18.*Rattigan & Lal Chand, JJ.*

C. A. No. 513 OF 1905.

15TH APRIL, 1907.

Custom—Hindu Law—Burden of proof—Aroras of Chakwal Tahsil Jhelum District—Non-agriculturists owning land.

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that among *Aroras* of *Chakwal Tahsil* of the *Jhelum District*, there was a custom under which the collaterals of a sonless proprietor were competent to restrain him from alienating ancestral property without necessity.

Mr. Oertel, Advocate, for Appellants.

Mr. M. S. Bhagat, Advocate, for Respondents.

GOHRA *v.* HARI RAM.

No. 19.*Rattigan & Lal Chand, JJ.*

C. A. No. 406 OF 1907.

13TH & 14TH JUNE, 1907.

Limitation Act (XV of 1877), Section 12—Limitation—Revision—Civil cases—Time requisite for obtaining copies of decree and judgment—Hindu Law—Widow's estate—Self-acquired property. Alienation of—Reversioner's right to restrain.

Held, that section 12 of the Limitation Act applies to applications for revision made under Section 70 (b) of the Punjab Courts Act.—20 *P.R.*, 1907; *s. c.*, 48 *P. L. R.*, 1907 *overruled*.

A reversioner of a Hindu widow is competent to restrain her from alienating without necessity ancestral and self-acquired property of her husband to which she has succeeded on his death.

Lala Hukam Chand, Pleader, for Appellants.

Rai Sahib Lala Sukh Dial, Pleader, for Respondents.

KIRPA RAM *v.* RAKHI.

No. 20.*Rattigan, J.*

C. A. No. 772 OF 1904.

3RD DECEMBER, 1906.

Limitation Act (XV of 1877), Schedule II, Article 179—Execution of decree—Limitation—Step in aid of execution—Prayer for notice to be issued to the judgment-debtor under Section 248, C. P. C.

An application for execution of decree containing a prayer for notice under section 248 of the Civil Procedure Code must be treated as an application to take some step in aid of execution within the meaning of Article 179 of the second Schedule of the Limitation Act, however defective it may be in form as an application to execute the decree.

Mr. Fazal-i-Hussain, Advocate for Appellant.

Rai Sahib Lala Sukh Dial, Pleader for Respondent.

SHANKAR LAL *v.* ZORAWAR SINGH.

No. 21.

Rattigan, J.

C. R. No. 2275 OF 1906.
1ST DECEMBER, 1906.*Civil Procedure Code (Act XIV of 1882), Section 331—Execution of decree—Resistance by third party in good faith.*

When a person who is not a judgment-debtor obstructs delivery of possession of immovable property to the decree-holder, in execution of decree for possession passed in his favor, claiming in good faith a right to do so, the Court must proceed under Section 331 of the Civil Procedure Code. The fact that the objector has temporarily lost possession of the property after making objection does not affect his right to have his claim investigated by Court under the section.

Messrs. M. S. Bhagat, and Pestonji Dadabhai, Advocates, for Petitioner.
Mr. Beechey, Advocate for Respondent.

SUNDAR DAS *v.* RAJA BALDEO SINGH.

No. 22.

Chatterji & Rattigan, JJ.

C. A. No. 120 OF 1906.
20TH NOVEMBER, 1906.*Punjab Descent of Jagirs Act (IV of 1900), Section 8 (3)—Execution of decree—Attachment—Jagir.*

Section 8 of the Punjab Descent of Jagirs Act, 1900, is not limited to assignments solely made by Government, but also includes a sub-assignment made by the original assignee. And the decree-holder is not entitled to attach and sell sub-assignment of land revenue made with the sanction of Government.

*Lala Ishwar Das, Pleader, for Appellant.**Rai Sahib Lala Sukh Dial, Pleader, for Respondent.*BHAGWAN DAS *v.* RAM DAS.

No. 23.

Johnstone & Rattigan, JJ.

C. A. No. 694 OF 1906.
22ND JANUARY, 1907.*Custom—Muhammadan Law—Succession—Widow—Daughter—Gurmani Bilochis of Dera Ghazi Khan District.*

Held, that in matters of succession *Gurmani Bilochis* of Dera Ghazi Khan District are governed by custom and not by Muhammadan Law.

Held, also, that according to custom of the tribe the collaterals of a sonless proprietor are entitled to succeed to his ancestral property, to the exclusion of his daughters, and the widow of the deceased can only claim to be maintained out of his property, but is not entitled to possession of it.

*Mr. Morrison, Advocate, for Appellants.**Mr. Nanak Chand, Advocate, for Respondents.*BAKHT SAWAI *v.* SARDAR KHAN.

No. 24.*Rattigan & Lal Chand, JJ.*

C. R. No. 619 OF 1906.

4TH APRIL, 1907.

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Article 2—Limitation Act (XV of 1877), Article 141—Limitation—Suit for possession of ancestral land by reversioner on the death of widow of sonless male proprietor against his alienee.

Held, that article 141 of the second schedule of the Limitation Act, 1877 and not article 2 of the Punjab Limitation Act, governs a suit for possession of ancestral land by a reversioner against the alienee from a male proprietor filed after the death of his widow.

Mr. McDonald, Pleader, for Petitioners.

Mr. Golak Nath, Advocate, for Respondents.

MIRAN BAKHSH *v.* AHMAD.

No. 25.*Robertson, J.*

CR. R. No. 886 OF 1907.

3RD AUGUST, 1907.

Excise Act (XII of 1896), Sections 30, 31, 46 (1) (c).

The accused, resident of a District in British territory, had gone to a Native State where he purchased a bottle of spirit from a vendor of liquor with a view to escape from the plague epidemic then prevailing in the State. He used one-third of the liquor purchased by him and brought the rest with him to his district. For this he was convicted of the offence under section 46 (1) (c) of the Excise Act.

Held, that the conviction was legal, for under section 46 (1) (c) of the Excise Act, 1896, the introduction of any quantity of foreign spirits was illegal, however small it might be.

SHER SINGH *v.* KING-EMPEROR.

No. 26.*Sir William Clark, Kt., Chief Judge.*

C. A. No. 518 OF 1907.

14TH JUNE, 1907.

Muhammadian Law—Gift—Death-bed gift—Marriage. Presumption of, from continued co-habitation as husband and wife.

Continual co-habitation as husband and wife raises a presumption of marriage.

A gift by an old man of the age of eighty made during his illness three days before death is invalid as made in contemplation of death.

Rai Sahib Lala Sukh Dial, Pleader, for Appellants.

Mr. Golak Nath, Advocate for Respondent.

AHMED BUKHSH *v.* HUSAIN BIBI.

No. 27.*Johnstone & Lal Chand, JJ.*

C. A. No. 503 OF 1907.

24TH JULY, 1907.

Punjab Pre-emption Act (II of 1905, Local), Sections 3(5), 4—Pre-emption—Sale—Lease in perpetuity—Landlord and Tenant—Agreement creating right of occupancy.

By an agreement the defendant was made an occupancy tenant in consideration of annual rent and a certain sum as *nazrana* to enjoy the same rights as other occupancy tenants in the village. The defendant was also made liable to render services and on his death the land was to revert to the landlord.

Held, that the agreement could not be regarded as a sale and subject to the right of pre-emption.

Mr. Shadi Lal, Advocate for Appellants.

Mr. Beni Pershad, Advocate for Respondents.

BHAGWAN DAS *v.* SIDHU.

No. 28.*Johnstone, J.*

C. A. No. 426 OF 1907.

3RD AUGUST, 1907.

Succession Certificate Act (VII of 1889), Section 7—Succession certificate—Rival claimants—Duty of Court to adjudicate on rival claims.

When there are several claimants for a certificate under the Succession Certificates Act the Court must adjudicate on their rival claims and grant the certificate to one who has a preferable claim and cannot refuse to grant the certificate and refer the parties to a civil suit.

Mr. Duni Chand, Advocate for Appellant.

Bhagat Gobind Das, Pleader, for Respondent.

RUKMAN DEVI *v.* SAIN DAS.

No. 29.*Johnstone & Lal Chand, JJ.*

C. R. No. 22 OF 1907.

16TH JULY, 1907.

Punjab Land Revenue Act (XVII of 1887), Section 158 (XVII)—Punjab Tenancy Act (XVI of 1887), Section 77 (3) (i)—Jurisdiction of Civil and Revenue Courts—Partition—Declaratory suit by occupancy tenant that land in suit being used for grazing cattle was not liable to be partitioned.

Held, that the Civil Court is competent to try a suit by occupancy tenants against the proprietary body of the village for a declaration that the land in suit, being used for grazing cattle by all the residents of the village was not liable to be partitioned.

SUNDAR *v.* WAZIRA,

No. 30.

*Johnstone, J.*C. R. No. 1418 OF 1907.
26TH JULY, 1907.

Punjab Laws Act (IV of 1872), Section 11—Custom—Pre-emption—Houses—Towns—Co-sharer—Vicinage—Kucha Billa Kabutarbaz, Mohalla Kabuli Mal, Lahore City—Evidence—Instances in neighbouring kucha.

When there is a small blind alley in which no case of pre-emption has occurred and there are lanes, opening into it in which cases have occurred, it is a reasonable inference that in that section of the town the custom does prevail, and so it prevails in the blind alley.

A co-sharer has a superior right of pre-emption over a person whose house merely adjoins the one sold.

Held, that the custom of pre-emption prevails in *Kucha Billa Kabutarbaz* in Mohalla Kabuli Mal of Lahore City.

Mr. Certei, Advocate, for Petitioner.

Mr. Pestonji Dadabhai, Advocate and *Pandit Sheo Narain*, Pleader, for Respondents.

ALLAH DITTA *v.* RAJ KUMAR.

No. 31.

*Rattigan & Shah Din, JJ.*C. A. No. 540 OF 1907.
11TH JULY, 1907.

Hindu Law—Joint Hindu family—Father's power to alienate self-acquired property.

Held, that in a joint Hindu family the father has unrestricted power of disposing of his self-acquired property as he likes.

Mr. Shelverton, Advocate, for Appellants.

SOHAN LAL *v.* LABHU RAM.

No. 32.

*Kensington, J.*C. A. No. 708 OF 1906.
7TH NOVEMBER, 1906.

Civil Procedure Code (Act XIV of 1882), Section 545—Execution of decree—Appeal against order refusing stay of execution.

Held, that no appeal lies against an order refusing to stay execution of a decree passed under Section 545 of the Civil Procedure Code. *I. L. R., XXIX Bom., 71 followed.*

CAMERON *v.* BULAKI MAL.

No. 33.*Robertson & Shah Din, JJ.*C. A. No. 25 OF 1907.
28TH MARCH, 1907.

Limitation Act (XV of 1877), Schedule II, Article 120—Limitation—Declaratory suit that plaintiff is owner in possession of land recorded in revenue papers in the name of defendant.

A person alleging himself to be in possession as owner of land recorded in revenue papers in the name of another is not debarred from filing a suit for declaration of his right by the mere fact that he has omitted to sue within the period of limitation to get the entry corrected. When his right to hold the land is invaded a fresh cause of action accrues in his favor and he can bring his suit within six years from the date of accrual of cause of action under article 120 of the Limitation Act.

*Rai Sahib Lala Sukh Dial, Pleader, for Appellants.**Mr. Harnam Das, Advocate, for Respondents.***HAKIM SINGH v. WARYAMAN.****No. 34.***Robertson & Shah Din, JJ.*C. A. No. 899 OF 1906.
29TH MARCH, 1907.

Pre-emption suit—Limitation—Punjab Pre-emption Act (II of 1905), (Local), Sections 28, 29. Applicability of—

Section 28 of the Punjab Pre-emption Act is intended to provide a period of at least one year for all persons who had the right to sue at the commencement of the Act and Section 29 provides for the period of limitation in all cases in which the right to sue accrues after the commencement of the Act.

And a suit for pre-emption is none the less governed by section 28 of the Act when under the new Act the plaintiff is relieved of the burden of proving a custom to maintain his suit which he had to substantiate to obtain a decree under the old law.

*Rai Sahib Lala Sukh Dial, Pleader, for Appellants.**Pandit Sheo Narain, Pleader, for Respondent.***THAKARIA v. DAYA RAM.****No. 35.***Sir William Clark, Kt., C.J. & Reid, J.*C. A. No. 688 OF 1906.
15TH JULY, 1907.

Interest—Vendor and purchaser—Interest on purchase money withheld by purchaser.

Held, that ordinarily a purchaser is bound to pay interest to the vendor on the amount of purchase money withheld by him.

Mr. Muhammad Shafi, Advocate and Pandit Ram Bhaj Datta Chowdhri, Pleader, for Appellants.

Mr. Shadi Lal, Advocate and Sardar Wazir Singh, Pleader, for Respondent.

SARAN v. BASHESHAR NATH.

No. 36.
*Robertson & Kensington, JJ.*C. A. No. 491 OF 1906,
26TH APRIL, 1907.

Specific Relief Act (1 of 1877), Section 42—Declaratory suit—Vexatious suit—Suit for declaration that the defendant was not the son of plaintiff's brother and that he had no capacity to beget him—Trial of unnecessary issues.

When a Hindu executed a Will by which he deliberately excluded the plaintiff, his brother, from ever inheriting any part of his property and the plaintiff after his brother's death sued that the defendant, alleged by the widow of his brother to be her posthumous son, was not his brother's son and that his brother and his wife had no capacity to beget him and the Court took evidence and decided the points at issue—

Held, that the suit was obviously a vexatious one and the plaintiff having no excuse for bringing the suit for declaration, the Court should have refused to go into the questions raised by him. The plaintiff had no claim as reversioner whether immediate or prospective to his brother's property and as to his own he could prevent its passing to defendant by Will and required no assistance from Court.

Mr. Certeal, Advocate for Appellants.

Bhagat Ishwar Das, Pandit Sheo Narain and Rai Bahadur Bakhshi Sohan Lal, Pleaders, for Respondents.

RALLIA v. GOKAL CHAND.

No. 37.
*Robertson & Lal Chand, JJ.*C. A. No. 825 OF 1902.
26TH OCTOBER, 1906.

Limitation Act (XV of 1877), Section 22—Civil Procedure Code (Act XIV of 1882), Section 27—Parties—Joinder of plaintiff after expiry of limitation period—Hindu Law—Joint Hindu family—Suit filed by managing members as such—Joinder of other members as plaintiffs afterwards.

Where in the case of a firm consisting of members of a joint Hindu family the managing members brought a suit in the name of the firm and on the defendant's objecting that other members of the family were necessary parties they were at once joined as plaintiffs—

Held, that as for purposes of limitation in all cases when action is taken under section 27 of the Civil Procedure Code the suit must be deemed to have been instituted on the day when the plaint was originally filed in Court, the suit was not barred by limitation.

Messrs. Muhammad Shafi, Shadi Lal, Advocates, and Lala Lajpat Rai, Pleader, for Appellants.

Mr. Gurcharan Singh, Advocate, for Respondents.

BEHARI LAL v. RAM CHAND.

No. 38.*Reid, J.*

C. R. No. 1352 OF 1907.

29TH JULY, 1907.

Hindu Law—Joint Hindu family—Father's debts—Suit against father—Decree against son as legal representative after father's death pending suit—Execution of decree—Son's right to question binding nature of the debt.

Held, that when a decree is passed against a son in a joint Hindu family as the legal representative of his father for the debts due by the latter, the former, son, is entitled, when the decree is sought to be executed to contend that owing to the nature of the debt he and the property in his hands are not liable to satisfy the decree.

Rai Sahib Lala Sukh Dial, Pleader, for Petitioners.

Pandit Sheo Narain, Pleader, for Respondent.

NATHU v. AMIR CHAND.

No. 39.*Sir William Clark, Kt., C. J.*

C. R. No. 725 OF 1907.

5TH JUNE 1907.

Punjab Pre-emption Act (II of 1905 (Local)), Sections 2 (3), 28, 29—Pre-emption suit—Limitation.

The sale took place on 5th August 1904. Mutation of names took place on 7th June 1905. The suit for pre-emption was instituted on 27th June 1906.

Held, that the suit was not barred by limitation as under section 29 of the Punjab Pre-emption Act the plaintiff could bring his suit within one year from the date of the attestation and that section 28 had no application to the case.

Section 29 is the substantive section fixing the period of limitation and by Section 2 (3) it applies "to every claim to the right of pre-emption whether that right has accrued before or after its commencement."

Lala Durga Das, Pleader, for Petitioner.

Mr. B. C. Chatterji, Advocate for Respondent.

LADHU v. SARDAR MUHAMMAD.

FULL BENCH.

No. 40,

Reid, Rattigan and Lal Chand, JJ.

C. R. No. 278 OF 1907.

27TH JULY & 3RD & 5TH AUGUST 1907.

Jurisdiction—Valuation of suit—Appeal—Further appeal—Claim for possession of house—Decree on payment of certain sum for improvements—Court Fees Act (VII of 1870), Sections 7 (v)(e), 9.

In a suit for possession of a house the plaintiff is bound to state market value of the house and he must pay Court-fee on the value stated by him. When it appears to it or the defendant pleads that the plaintiff has underestimated his claim, the Court ought to take immediate steps under section 9 of the Court Fees Act for ascertaining the market value and order deficiency in Court fee to be made up, if enquiry shows that the value has actually been under estimated by the plaintiff. The value fixed by the plaintiff is a tentative one and it is the value found by Court and not that stated by plaintiff that governs the jurisdiction of the original Court. Where it exceeds the jurisdiction of the Court, the Court must return the plaint for presentation to proper Court, at whatever stage of the suit the true value may be determined by it. Similarly, the Appellate Court has no jurisdiction to adjudicate on the appeal when it finds that the value of the suit exceeds its pecuniary jurisdiction.

The plaintiff sued for possession of a house which he valued at Rs. 90 in the Court of a Munsiff of the 1st Class and obtained a decree for possession on payment of Rs. 684-7-0, value of improvements to the house by the defendant. He appealed to the District Judge against so much of the decree as awarded compensation for improvements and the District Judge held that he had jurisdiction to hear the appeal.

Held, by the Full Bench, that the District Judge had no jurisdiction to entertain the appeal.

ABDUR RAHMAN *v.* CHARAG DIN.

No. 41.

Reid, J.

C. A. No. 1135 OF 1906.

8TH MAY 1907.

Pre-emption—Claimants having equal right—Superior diligence in enforcing claim—Limitation Act (XV of 1877), Schedule II, Article 120—Limitation—Suit against rival claimant.

Where several persons have equal right of pre-emption in the sale of a house the one who first files a suit in Court is entitled to a decree on the ground of superior diligence in enforcing his claim. His rival who files a suit subsequently cannot defeat him by obtaining a consent decree before his suit is heard.

Held, that article 120 and not Article 10 of the second Schedule of the Limitation Act governs a suit for possession of property by right of pre-emption filed by the plaintiff against his rival claimant. 11 P. R., 1898 followed.

Lala Dwarka Das, Pleader for Appellants.

Lala Chuni Lal, Pleader for Respondents.

RAM PARSHAD *v.* GANGA DATT.

THE ACTS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL FOR THE YEAR 1908.

ACT NO. I OF 1908.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL IN COUNCIL
ON THE 3RD JANUARY, 1908.

An Act further to amend the Legal Practitioners Act, 1879.

WHEREAS it is expedient further to amend the Legal Practitioners Act, 1879; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Legal Practitioners (Amendment) Act, 1908.

Amendment of section 4
of Act XVIII of 1879,
ly:—

2. In section 4 of the Legal Practitioners Act, 1879, the following amendments shall be made, namely:—

- (a) after the words "this Act" the words "or enrolled as a Pleader in the Chief Court of the Punjab under section 8 of this Act" shall be inserted; and
- (b) after the words "no such Vakil" the words "or Pleader" shall be added.

Addition to section 7 of
Act XVIII of 1879.

3. To section 7 of the said Act the following shall be added, namely:—

"Provided that, on the admission as a Pleader of any person who has been previously entered as a Vakil or Attorney on the roll of a High Court established by Royal Charter, the High Court may in its discretion issue to such person a certificate authorising him to practise permanently in the Courts and in the offices specified therein, and a certificate so issued shall not require to be renewed under this section."

Amendment of section 25
of Act XVIII of 1879.

4. To section 25 of the said Act the following shall be added, namely:—

"Provided also that no stamped paper shall be required in the case of a certificate whether original or renewed authorising, under section 7, a Vakil or Attorney on the roll of a High Court established by Royal Charter to practise as a Pleader."

Amendment of section 38
of Act XVIII of 1879.

5. In section 38 of the said Act, "7," shall be added after "5," and "25," after "16."

ACT NO. II OF 1908.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL IN COUNCIL ON THE 3RD
JANUARY, 1908.

An Act further to amend the Indian Tariff Act, 1894.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1894; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Tariff (Amendment) Act, 1908.

2. In No. 1 of Schedule III of the Indian Tariff Act, 1894, as amended Amendment of Schedule III of Act VIII of 1894. by the Indian Tariff Act, (1894) Amendment Act, 1896, "annas 2" shall be substituted for "anna 1" in the fourth column as the rate of duty to be levied and collected per Imperial gallon or six quart bottles of ale, beer, porter, cider and other fermented liquors.

ACT NO. III OF 1908.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL IN COUNCIL ON THE 17TH JANUARY, 1908.

An Act further to amend the law relating to Private Trusts and Trustees.

WHEREAS it is expedient further to amend the law relating to Private Trusts and Trustees; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Trusts (Amendment) Act, 1908.

Amendment of section 20, Act II of 1882, namely:—

2. For clause (d) of section 20 of the Indian Trusts Act, 1882, the following clause shall be substituted,

"(d) in debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India, by or on behalf of any municipal body, port trust or city improvement trust in any Presidency-town or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi;"

ACT NO. IV OF 1908.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL IN COUNCIL ON THE 14TH FEBRUARY, 1908.

An Act further to amend the Coroners Act, 1871, and the Prisoners Act, 1900.

WHEREAS it is expedient further to amend the Coroners Act, 1871, and the Prisoners Act, 1900; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Coroners (Amendment) Act, 1908.

Amendment of section 9, Act IV of 1871.

2. In section 9 of the said Act, for the word "buried" the words "disposed of" shall be substituted.

3. In section 11 of the said Act, for the words "where the first was insufficient" the words "where the Coroner considers it necessary or desirable in the interests of justice to take a further inquisition" shall be substituted.

Amendment of section 11, Act IV of 1871.

4. To section 15 of the said Act the following shall be added namely:—

Addition of proviso to section 15, Act IV of 1871.

"Provided that the Coroner may, with the concurrence of a majority of the jury, dispense with a view of the body, if he is satisfied, from medical evidence or medical certificates, that no advantage would result from such viewing."

